UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

ROBERT A. FALISE; LOUIS KLEIN, JR.; FRANK MACCHIAROIA; and CHRISTIAN E. MARKEY, JR., As Trustee,

Plaintiffs,

vs.

THE AMERICAN TOBACCO COMPANY; RJ REYNOLDS TOBACCO COMPANY; B.A.T. INDUSTRIES, PLC; BROWN & WILLIAMSON TOBACCO CORPORATION; PHILIP MORRIS INCORPORATED; LIGGETT GROUP, INC.; and LORILLARD TOBACCO COMPANY,

Defendants.

VIDEOTAPED DEPOSITION OF

PROFESSOR KAREN GROSS

New York, New York

Tuesday, June 6, 2000

Reported by:
ROBERT X. SHAW, CSR
CSR NO. 817
JOB NO. 109028

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June 6, 2000
8:43 a.m.

Videotaped Deposition of PROFESSOR KAREN GROSS, held at the offices of Orrick Herrington Sutcliffe, LLP, 666 Fifth Avenue, New York, New York, pursuant to Stipulation, before Robert X. Shaw, CSR, a Notary Public of the State of New York.

APPEARANCES:

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ALSO PRESENT:
Paul Jansen, Videographer
Esquire Video Services

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MR. FINK: Would you mark these documents as Exhibits 1 and 2, for identification.

(Gross Exhibit 1, expert report of Karen Gross, marked for identification as of this date.)

(Gross Exhibit 2, supplemental expert report, marked for identification as of this date.)

THE VIDEOGRAPHER: This is tape number 1 of the video deposition of Karen Gross, taken by Stephen Fink in the matter of Robert A. Falise, Louis Klein, Jr., Frank Macchiaroia and Christian E. Markey, Jr., as trustee, versus the American Tobacco Company, RJ Reynolds Tobacco Company, B.A.T. Industries, PLC, Brown & Williamson Tobacco Company, Philip Morris Incorporated, Liggett Group Incorporated and Lorillard Tobacco Company in the United States District Court for the Eastern District of New York, No. CV 977640 (JBW).

This deposition is being held at the offices of Orrick Herrington & Sutcliffe at 666 Fifth Avenue, New York, New York on June 6, 2000 at approximately 8:43 a.m.

My name is Paul Jansen from the firm of Esquire Video Services and I am the legal video specialist.

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The court reporter is Robert Shaw, in association with Esquire Reporting.

Will counsel please introduce themselves.

MR. FINK: Stephen Fink, from the law firm of Orrick Herrington & Sutcliffe, for the plaintiff trustees, the Manville Trust.

MR. MUNSON: Jim Munson, from the law firm of Kirkland & Ellis in Chicago, for Brown & Williamson Tobacco.

MR. REINSTEIN: Ezra Reinstein, from the law firm of Kirkland & Ellis.

MS. DONAHUE: Bonnie Kay Donahue, from Womble Carlyle Sandridge & Rice, on behalf of RJ Reynolds Tobacco Company.

THE VIDEOGRAPHER: Will the court reporter swear in the witness.

KAREN GROSS, called as a witness, having been first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY

MR. FINK:

Q. Good morning, Professor Gross.

A. Good morning.

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Q. Have you testified at a deposition before?

A. No.

Q. The ground rules are fairly simple: I will ask you some questions and if you can do your best to answer them, please be sure to answer out loud.

The court reporter can't take down a shrug, or nods, or that sort of thing. If you have a question that you don't understand one of my questions, please let me know. If you don't, I will assume that you understand that.

A. Okay.

Q. Professor Gross, is it your understanding that you have been designated as an expert witness in this lawsuit?

A. Yes. That's my understanding, that I have been retained as an expert witness.

Q. And the expertise that you bring to this case is as a bankruptcy law professor; is that correct?

A. The expertise that I bring is my entire wealth of experience, which includes my currently being a law professor, but it includes a lot of other activities that I have done over the course of my professional career.

Q. Those activities that you have engaged in

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in the course of your professional career as a law professor or in some other capacity?

A. I would say both in my capacity as a law professor, but also in my years of private practice.

Q. So, the expertise you bring today, then, is in your capacity as a law professor and as an attorney; is that correct?

A. Yes. I think it is fair to say that it is a wealth of experience of everything that I have done since I graduated from law school some 20 plus years ago.

Q. Are there any areas of expertise that you claim to bring to this case outside of the realm of being an attorney or a law professor?

A. Um, I would say, in addition to my experience as a professional, I bring to bear the normal life experiences that enrich one's understanding of the world.

Q. The same life experiences that the jury might have?

A. The life experiences that people, in general, have.

Q. Are you a trained statistician or a econometrician?

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A. I have had experience with empirical data and have conducted empirical studies, but I would not consider myself a trained statistician or trained in econometrics.

Q. Do you have a degree in statistics or econometrics?

A. No, I do not.

Q. After you graduated from law school, you went to work for the firm of Arvey Hodes; is that correct?

A. Arvey Hodes Costello & Burman, yes.

Q. Where was that firm located?

A. That firm is located, was located in Chicago, Illinois.

Q. Does the Arvey Hodes firm no longer exist?

A. The Arvey Hodes firm has ceased to exist; that is correct.

Q. When did it cease to exist?

A. It ceased to exist after I left it. I am not sure I know the precise year in which it ceased to exist.

Q. How many attorneys worked at the Arvey Hodes firm, when you went there?

A. Over this time period that I worked there, I would say about 120 lawyers worked there.

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Q. Why don't we, just for the record, so the record is clear, when was the time period that you worked there?
A. I worked there in the summer between my second and third year of law school, and sporadically during my third year of law school and then full time when I graduated from law school.
Q. What year did you graduate from law school?
A. I graduated from law school in 1977.
Q. You worked at Arvey Hodes from approximately 1977 to 1980, is that correct, after law school?
A. After law school, it would be 1977 to 1980.
Q. Am I correct in understanding that you worked both in the corporate practice and the bankruptcy practice at Arvey Hodes?
A. That is correct.
Q. Did there come a time when you went from one department to another or did you split your time in both of those departments, while you were there? How did that work?
A. I would say I initially started out as a corporate lawyer, and then I began working on a variety of issues that crossed into the bankruptcy field, including an assessment of the differences between

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Bankruptcy Act and the Bankruptcy Code. There was a change in the law in that time period.
And I gradually continued the bankruptcy work, although I remained, I would say, somewhat involved in cases that allowed for intersection between corporate law and bankruptcy law.
Q. Is that true throughout the 1977 to 1980 time frame?
A. Yes. Although I would say that if you were assessing my emphasis, it was in the bankruptcy, as opposed to the corporate arena, as one traditionally defines those.
Q. Was that from the time when you began working at Arvey Hodes or was that after some period of time, when your emphases became primarily bankruptcy?
A. I would say that developed over the course of the time that I was there.
Q. When you came in, you were primarily a corporate associate; isn't that right?
A. I would say for perhaps, primarily, perhaps the first six months, maybe a year.
Q. Okay. That was my question.
Are there any significant, particular matters that stand out in your mind as having been particularly

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significant that you worked on while you were at Arvey Hodes?
A. I would say they were all significant, certainly to the clients that were involved in them.
Q. Are there any that you spent a substantial portion of your time on that you recall as being significant to you?
A. I worked on a variety of cases over the time I was there, all of which I would say had relatively equal importance.
Q. What were the nature of the bankruptcy matters that you worked on?
A. Um, well I worked on a variety of Chapter 11 cases from both the debtor side and the creditor side, and I did a fair amount of writing and analysis of the bankruptcy laws, particularly the change from the Bankruptcy Act to the Bankruptcy Code.
Q. Can you tell me what was the largest Chapter 11 that you worked on while you were at Arvey Hodes?
A. Could I just ask you, "large" in terms of?
Q. In terms of the revenues of the company involved. Or the assets of the company involved, if that is easier.
A. I think I would be speculating now, after all

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this time, as to which one was the largest.
Q. Are there two or three that stand out, in your mind, as having been the largest?
A. I would say virtually all of the cases on which I worked were more or less of the same magnitude; no single one stands out as particularly prominent.
Q. Can you give me a couple of examples of the chapter 11s that you worked on while you were at Arvey Hodes?
A. Sure. I worked on a case called Dunhill, which was one of the largest insert mailing companies. They do the inserts that appear in your gas bills. They do the inserts where you can acquire products when you use your gas credit card.
I worked on a company that was involved in the development and sale of humidifiers.
And I worked on a case involving a number of retail stores in the clothing industry.
Q. Did you work on any Chapter 11 bankruptcies involving companies that sold or manufactured asbestos while you were at Arvey Hodes?
A. No, I did not. At least, to the best of my knowledge, I am not aware that any sold asbestos.
Q. Did you work on any mass tort bankruptcy

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cases while you were at Arvey Hodes?
A. Some of the cases in which I was involved raised tort issues and there were some tort claims brought against some of the debtors, but I would not call them mass tort cases in any technical sense.
Q. You have an understanding of the meaning of the phrase "mass tort"; isn't that right?
A. Well, I have my own understanding, yes.
Q. In fact, you have used that phrase in a book that you have written; isn't that right?
A. The book that I have written, Failure and Forgiveness, does address, amongst many topics, mass torts.
Q. Mass torts is not a major focus of that book; is it?
A. Um, as I characterize my own work, I would say the book has many foci, many focuses, of which mass torts is one of them.
Q. That book has a number of chapters; does it not?
A. Yes, it does.
Q. Do any of those chapters address mass torts?
A. Yes.
Q. Does the book have a table of contents?

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A. I believe it does.
Q. Does the table of contents identify any of the chapters addressing mass torts?
A. The chapter titles themselves do not use the words "mass torts," but the concept of mass torts and the issues surrounding mass torts appear in a variety of the chapters in the book.
Q. Is that right? This book is about 250 pages in print; isn't that right?
A. I think that is right.
Q. And about five of those pages address mass torts; isn't that right?
A. I don't think that is right, Mr. Fink. A number of the issues surrounding mass torts don't carry the specific label "mass torts."
But the thoughts underlying an understanding of mass torts run throughout that book. So, I think the answer to your question would be no, it is not isolated to just a few pages.
Q. The express discussions of mass torts are isolated in just a few pages of the book; aren't they?
A. Well, although I have not counted, the explicit reference to mass torts by name may be on only a certain number of pages, but the concepts and the

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thoughts that one needs to understand mass torts are embedded in the book.
Q. What's your definition of "mass torts"?
A. I would say that "mass torts" is a term that is used to encapsulate a complex group of issues that surround multiple tort injuries to past, present and future claimants.
Q. So, if somebody operates a taxicab business and on occasion one of those cabs runs into somebody, that would be a tort; right?
A. Um, if a single driver wronged, his or her own cab hit someone, that would be a tort.
Q. Right. And if I owned a taxicab business and from time to time one of my cabs ran into people and there was an expectation in the future that from time to time one of my cabs will continue to run into somebody, does that create a mass tort, under your definition?
A. Um, I would say that, in that case, I might characterize it as multiple torts, as opposed to mass torts.
Q. You ultimately left the Arvey Hodes firm; is that right?
A. Yes, I did.

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Q. Why did you do that?
A. I wanted to have a more diverse bankruptcy experience and I also was interested in the quality of the practice that some of the New York firms had, in terms of the sophistication of both the cases and the lawyers working on them.
Q. Where did you go after Arvey Hodes?
A. I went to work at Weil Gotshal & Manges in New York.
Q. When did you start at Weil Gotshal?
A. I started in 1980.
Q. You stayed there through 1984; is that right?
A. I stayed there until the beginning of 1984.
Q. When you left Arvey Hodes, you were a third year associate; is that right?
A. I would say it was a little more than three years. I would have to do the exact math, but give or take.
Q. When you came to Weil Gotshal, did you retain whatever seniority you had at Arvey Hodes?
A. Yes. I did, indeed. That was one of the issues that I discussed in moving laterally was the significance and importance to me not to lose "credit" in terms of my development as a lawyer.

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Q. When you came to Weil Gotshal, did you come there as a bankruptcy attorney?
A. I would say I came as a lawyer with both corporate and bankruptcy experience.
Q. Did Weil Gotshal have a bankruptcy practice group?
A. Yes. Weil Gotshal did.
Q. Were you hired into that bankruptcy practice group?
A. Yes. I was hired into the bankruptcy group, with an understanding that I came at it with a corporate experience, as well.
Q. Are there any matters that you worked on at Weil Gotshal that stand out, in your mind, as having been particularly significant to you?
A. I would say that all of the matters that I worked on, or at least a significant number of them, were significant and important and have enriched my professional development and understanding.
Q. Were there any matters that you worked on that took up more of your time than other matters that you worked on?
A. As with any lawyer in law practice, there were certain cases at certain points in time that

occupied more of my time than other cases, but over the course of the years that I was there, I worked on a number of cases.
Q. How many different matters did you work on while you were there, approximately? Do you have any idea?
A. I would not even hazard a guess, as to the exact number.
Q. Did you work on any Chapter 11 bankruptcies, while you were at Weil Gotshal?
A. Yes, I did.
Q. Did you have any sense of what percentage of the overall work that you did was on Chapter 11 bankruptcies?
A. Um, I would say the percentage of my work that involved cases actually in Chapter 11 was probably 80 to 90 percent of what I did.
Q. Can you give me some examples of the Chapter 11 cases that you worked on at Weil Gotshal?
A. I would be happy to.
Ah, I worked on WT Grant, which was one of the largest retail stores to be liquidated, and in that capacity I represented the trustee of that case.
I worked on the Braniff Airlines case, and in

that capacity I worked on the side of creditors.
I worked on Columbia Ribbon & Carbon, which was a company that was involved in the development and sale of office supplies.
And I worked on John Muir, which was a liquidation of a large stock brokerage entity, on the side of the trustee.
Those are some examples of the cases in which I worked, the Chapter 11 cases.
Q. Were you the attorney at Weil Gotshal primarily responsible for any of these representations that you have described?
A. At Weil Gotshal virtually every case is handled by a number of attorneys simultaneously and the exact number involved depended on the nature of the case. So, I would not say that I was in charge, to use your words, of any of those particular matters on my own.
Q. Were you the most senior attorney on any Chapter 11 representations during your tenure at Weil Gotshal?
A. Absolutely.
Q. Can you identify those for me, please?
A. Let me just clarify: The "most senior

associate" is that?
Q. No, my question is "the most senior attorney."
A. I am sorry, I did not understand your question, then, when it was asked originally.
I would say I was not the most senior attorney on the Chapter 11 cases that I described to you.
There were attorneys at Weil Gotshal who were more senior than I was on the cases in which I was involved. Although I had major responsibility in many of the cases that I was involved in.
Q. Are the cases that you have listed for me, WT Grant and Braniff Airlines, Columbia Ribbon & Carbon and John Muir, are those cases on which you had major responsibility?
A. On some of them, but not all of them.
Q. What was the largest Chapter 11 bankruptcy that you worked on where you had major responsibility, as you have used that term?
A. Could I just ask you the time frame: While I was at Weil Gotshal?
Q. While you were at Weil Gotshal.
A. I would say that two from the list that I

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have given you were Columbia Ribbon & Carbon and John Muir, would be my answer.
Q. Who did Weil Gotshal represent in the Columbia Ribbon & Carbon matter?
A. They represented the debtor.
Q. What was your role, your representation, Gotshal's representation of the debtor in the Columbia Ribbon & Carbon matter?
A. Could you repeat the question, I am sorry.
Q. My question is what your role was in that representation.
A. My role was basically in consultation with a more senior attorney to oversee that Chapter 11 from before the case was filed, all the way through its completion.
Q. When was the petition filed in the Columbia Ribbon & Carbon matter? Approximately. I am not trying to pin you down.
A. I would say it was in 1980.
Q. That was shortly after you began working at Weil Gotshal?
A. That is correct.
Q. And was the plan ultimately confirmed in the Columbia Ribbon & Carbon case?

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A. If my memory serves -- actually, I don't recollect whether the plan was ultimately confirmed.
Q. What do you recall about the outcome of that matter?
A. I recollect that ultimately the case was -- ultimately the company was liquidated, due to insufficient funding.
Q. In the John Muir matter who did Weil Gotshal represent?
A. If my memory serves me right, they represented the trustee.
Q. What was your role in Weil Gotshal's representation of the John Muir trustee?
A. My role was primarily in helping to stabilize the situation, because when a stock broker entity becomes insolvent it trips off lots of potential consequences for people who were customers of that brokerage house and it was very important to work very hard to make sure that the damage to customers was minimized and that assets were preserved, and the timeliness was key.
Q. Did you work on any mass tort bankruptcies while you were at Weil Gotshal?
A. I worked on cases where there were tort

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issues, but as you are using the term "mass tort" here, I would say that I did not work on cases involving mass tort issues, although a number of the cases that I worked on involved some of the same dynamics that are important in all Chapter 11 cases.
Q. But you did not work on any mass tort cases, as you have defined the term "mass torts"; right?
A. To the best of my recollection, I did not work on a mass tort case per se, although much of what I did enhances one's understanding of the entire process of Chapter 11, and many of the issues that occur in mass tort cases are issues with which I have familiarity, based on other cases that I worked on while at Weil Gotshal before that, subsequent to that.
Q. Did you work on any Chapter 11 cases involving asbestos companies, while you were at Weil Gotshal?
A. I dealt with a number of very large Chapter 11 cases with huge numbers of creditors and accounts receivable and I would not rule out the possibility that an asbestos company was a creditor or had an accounts receivable with one of the entities with which I worked.
Q. I guess my question is whether the debtors in

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any of the Chapter 11 cases that you worked on while you were at Weil Gotshal were asbestos companies.
A. I did not represent a debtor who was an asbestos company.
Q. Did you work on any cases, regardless of who Weil Gotshal represented, where the debtor in a Chapter 11 case was an asbestos company?
A. I did not personally work on any case in which an asbestos company was a debtor.
Q. What was your seniority level, when you left Weil Gotshal?
A. When I left Weil Gotshal, I suppose I would say I was a 6/7 tier person.
Q. Is that a six- to seven-year associate?
A. Yes. I was an associate.
Q. Why did you leave Weil Gotshal?
A. Ah, there are several reasons that I left Weil Gotshal. I became aware of a teaching opportunity and I had always wanted to teach. I taught since I have been in college.
And I had spent a great deal of time at Weil Gotshal traveling and on the road, and one of the things that academia afforded me was an opportunity to travel less and think and write more about the issues

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that interested me.
Q. Was anything communicated to you, before you left Weil Gotshal, about the likelihood of you becoming a partner at Weil Gotshal?
A. Weil Gotshal has an anti-nepotism policy, pursuant to which two partners cannot be married to each other. And my husband had been, and was, and is a partner at Weil Gotshal and it became very clear that both of us could not be partners there; and, indeed, I would say, um, many people, um, regretted, in some respects, our marriage because it precluded me from becoming a partner, um, and I would say many people were very clear, um, and up front about my qualifications as a partner and that, but for my husband, I could have had a long and very happy life at Weil Gotshal.
Q. After Weil Gotshal, where did you go?
A. I left Weil Gotshal to enter academia.
Q. Did you start at New York Law School after Weil Gotshal?
A. Yes. I began my teaching career at New York Law School.
Q. You began as associate professor; is that right?

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A. Yes. I entered New York Law School as an associate professor of law.
Q. What year was that?
A. It was in 1984.
Q. Did you begin teaching courses at New York Law School in 1984?
A. Yes, I did.
Q. What courses did you teach in 1984?
A. If my memory serves me right, I began by teaching contract law in the spring of 1984, and began in the summer of 1984; and then, in the fall of 1984 I taught, if my memory serves me right, either a basic bankruptcy course and contracts or a commercial transactions course and contracts.
Q. So, you are not certain whether or not you taught a bankruptcy course in the fall of 1984; is that right?
A. I would have to go back and check the records. My teaching package has, over the years, encompassed a variety of courses and I teach, depending on what the school needs, I teach different courses in different semesters. So, I can't give you a definitive word that I taught it in the fall of 1984.
Q. You have been at New York Law School since

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1984; isn't that right?
A. I have been employed by New York Law School, except for various time periods when I either was on sabbatical, or on leave to write, or teaching at another school. But my primary academic home has been New York Law School.
Q. Did you teach at New York Law School throughout the 1985 academic year?
A. Yes, I did.
Q. Did you teach any bankruptcy courses during the 1985 academic year?
A. I am sure I did. In preparation for this deposition I did not go back and look at precisely which years I taught what. I have, within my teaching repertoire, regularly taught either the basic bankruptcy course, bankruptcy policy, bankruptcy seminar, a bankruptcy seminar or Chapter 11, although in various years I have taught different ones and in different combinations.
Q. You have also taught a number of other subjects; is that right? Other than bankruptcy.
A. I have taught other courses, although most of them, if they aren't directly on bankruptcy, address bankruptcy-related issues and intersect with bankruptcy

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topics.
Q. You have taught contracts, for instance?
A. Yes. I taught contracts, although, as I tell my first year law students, contracts, in many ways, is a precursor to understanding bankruptcy.
Q. Are you familiar with the expression that the law is a "seamless web"?
A. Yes, I am familiar with that expression.
Q. All right. So, in some respect any course taught at a law school is somehow related to any other course; isn't that right? The subject matter.
A. I suppose, in a hypothetical sense, one could find connection between lots of things. I find them among the courses that I teach; and, indeed, that is why the package of courses I teach are there because, for me, they provide certain consistent themes and consistent approaches and certain topics that repeat themselves or are developed, and are elaborated in different ways. But all surrounding similar themes.
Q. You have taught commercial transaction; is that correct?
A. Yes, I have taught commercial transaction.
Q. You have taught a seminar on feminist jurisprudence?

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A. Yes, I have.
Q. You have also taught a seminar on contracts, theory and practice?
A. Yes.
Q. What percentage of the courses that you have taught are expressly bankruptcy courses?
A. I want to be very clear. A lot of the courses I teach that are not labeled bankruptcy have bankruptcy components, but I would say, if you are measuring, between a third and a half of the courses that I teach are what you are calling specifically bankruptcy-related courses.
Q. Have you ever taught a course called "torts"?
A. In the context of teaching contracts, I talk about the differences between contracts and torts and in other of the courses that I teach I talk about tort concepts, but I have never taught a course specifically labeled "torts."
Q. Have you ever taught a course about mass torts?
A. I have taught courses that have addressed in detail the topic of mass torts, although the course itself did not carry the title "mass torts."

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Q. What are the courses that you taught that have addressed in detail the subject of mass torts?
A. I would say there are two courses in particular that in the curriculum the subject of mass torts, as I have defined it earlier, is addressed, and those would be the courses in Chapter 11 and the courses in bankruptcy policy and it is, to a lesser extent, a topic covered in the basic bankruptcy course. And, indeed, many of the basic bankruptcy case books have cases drawn from the field of mass torts, and it is also the subject area of a mock hearing that I regularly conduct in my basic bankruptcy course. And the subject of that mock hearing is mass torts.
Q. Do you lecture in your Chapter 11 course, as opposed to it being a seminar or something like that?
A. I am sorry. Could you --
Q. Do you give lectures in your Chapter 11 course?
A. I would describe my teaching style, my pedagogical style as a combination of a number of approaches that combine lectures at times. They are dialogue-based at times. They are experiential at times. They are interactive at times. They are group activities at times.

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So, I don't think a single approach. I have a multitude of things that I do when I teach, of which lecturing is one piece.
Q. In your Chapter 11 class do you give lectures dedicated to the subject of mass torts?
A. I actually have given some overview information about mass torts in the context of a Chapter 11 case, because some of the material that students need is best communicated through a lecture, which then enables them to do various interactive exercises and discussions, once they have certain background. So, it is one way that I use to communicate information, but not the only way.
Q. Do you give the students in your Chapter 11 course reading materials relating to mass torts?
A. I would say that every bankruptcy course that I have taught has materials on mass torts and large Chapter 11 cases because it is a very important way of both understanding Chapter 11, understanding the bankruptcy process more generally and allowing for comparisons and contrasts between large cases and smaller cases. So, I think it has permeated all of the curricula that I taught and teach.
Q. What specific information about mass tort

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bankruptcies do you attempt to communicate to your students? I am not asking for the subjects, but could you give me the --
A. Could you just give me the question again.
Q. I want to know what the subject matter of what you try to communicate to your students about mass torts is.
A. I would say that I cover topics from what I would call from filing to finish, and that is issues that range everywhere from Chapter 11, the right vehicle to use to resolve mass torts to, during a case, how one thinks about past, present and future claims. And the meaning of claim to how one resolves cases, in terms of both confirmation and the discharge and the injunctions and then to what happens to an entity on a go forward basis.
Q. All right.
A. So, aspects in various courses of all of those pieces are covered.
Q. Have you formed a view as to whether Chapter 11 is an appropriate vehicle to resolve mass tort cases?
A. I have a complex series of views on that question.

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Q. In your view, is it ever appropriate to use the Chapter 11 bankruptcy to resolve mass tort problems?

A. Is it ever appropriate?

Yes. Sometimes Chapter 11 is the best approach to resolving mass tort issues and sometimes it is not.

Q. Have you formed a view as to whether or not Chapter 11 bankruptcy is an appropriate way to resolve future claims, relating to a mass tort?

A. As an academic, I have a variety of complex views as to whether or not Chapter 11 is the best way to solve future claims issues.

Q. Is it your view that, under the current state of affairs, that future claimants should be deemed creditors in mass tort bankruptcies and paid through a trust mechanism, alongside of other unsecured creditors?

A. One of the views that I discuss in my book is that the bankruptcy law, as it is currently configured, does not adequately handle the issue of future claims, in part because when the law was drafted that was not an issue that people had in mind.

And so, when new issues have come up, like

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future claims, the existing bankruptcy law has had to wrestle with how to deal with that, and one of my views, as expressed in my book, is that that dilemma about how to deal with future claims is one that should be resolved in order to make Chapter 11 a better vehicle for handling these kinds of immensely complex and difficult issues.

Q. Is it your understanding that there is a debate among the courts as to whether or not future claimants should be treated as creditors in bankruptcy?

A. I would say in bankruptcy courts over almost every issue, but I think it is fair to say that courts have taken different views over the meaning of the word "claim."

Q. The circuit courts of appeal, to address the issue, disagreed as to whether or not future claimants should be treated as creditors in bankruptcy; isn't that right?

A. I would characterize it somewhat differently than you. I think it is fair to say that different courts have wrestled differently with how to define the term "claim" and what its ambit is. And there is no single unitary view, at present, that has captured the imagination of all judges everywhere, at least not

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yet.

Q. But those courts have specifically addressed this issue about the definition of "creditor" in the context of future claimants in mass tort bankruptcies; haven't they?

A. I don't want to define what every court has said everywhere.

Q. I am not asking you that. I am asking, were there courts that have addressed that issue?

A. Courts have clearly wrestled with the issue of the meaning of claim and the meaning of future claim, but not just in the mass tort context. It has been an issue that's come up in a variety of contexts, including mass torts, but not limited to it; and, indeed, some of the other areas where it has come up have informed the dialogue.

Q. Right. But my question is whether or not courts have addressed the question of whether future claimants in mass tort bankruptcies can be treated as creditors.

A. Yes. Courts have addressed the issue of how one defines claims and future creditors.

Q. They have addressed the question whether future claimants should be treated as creditors; right?

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A. Yes. There are court opinions addressing whether future claimants are creditors within the definition of "creditor" and "claim," as those terms are defined within the bankruptcy code itself.

Q. Right. You have expressed the view, on that question, that future claimants should be deemed creditors and paid through a trust mechanism alongside other unsecured creditors; right?

A. I want to be very clear here that there is a difference between what the law is, as it exists today, and how I would like the law to be, if I could change it.

And the views in my book, which I think are what you are reading from or looking at, are my hope and aspiration for what the law should be and what would make the law work better and what I think is the best view for courts to take as they think about the law, and for Congress to take as they think about the law.

But I understand that the courts have thought about it differently.

Q. Haven't you expressed the view that, under the existing law, that future claimants should be deemed creditors and paid through a trust mechanism,

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alongside other unsecured creditors?
A. I have taken the view that that, I think, is not only one plausible, but my best reading of the law, as it is.
Q. Have you ever taught any classes on the subject of class action procedure?
A. My course in consumer finance and collection addresses class action issues.
Q. Do you consider yourself an expert in the procedural requirements attending on class actions?
A. I have thought about class action issues a lot. I have served as a consultant on a major class action and I have written about issues that have involved class actions, but I would not hold myself out as an expert on class actions, nor the procedural requirements of same.
Q. What is the major class action on which you served as a consultant?
A. I have served as a consultant on a class action brought by a number of consumers against Sears.
Q. You were a consultant to the plaintiffs' attorneys in that case?
A. Yes. I have served as a consultant to the class action counsel.

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Q. What was the nature of the claim, or the claims, in that class consumer class action against Sears?
A. There are a variety of claims involving how Sears behaved in respect of these individuals during and after their respective bankruptcy cases.
Q. The consumer bankruptcy cases?
A. Yes. It is how Sears handled these consumers in the context of these individuals who accessed the bankruptcy system, what Sears did or did not do in respect of them both during their bankruptcy cases and then after they got their discharge.
Q. Were there tort claims at issue in this class action?
A. The claims arise under sections of the bankruptcy code under state unfair and deceptive practices acts and under RICO and, in that context, some of them may sound in tort.
Q. This is not a mass tort class action; is it?
A. There was plenty of injury, but I would not call it of the mass tort variety.
Q. Have you consulted on any other class actions?
A. No.

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Q. Is it fair to say that your major areas of academic interest, in general, or let's say in addition to your role as a bankruptcy professor, are consumer bankruptcy and feminist jurisprudence?
A. No. I don't think that is an accurate way of describing either what I do or what my expertise is. My expertise is in the bankruptcy system and all of its pieces and lots of what I have done and lots of what I think about fall outside of the arena of consumer bankruptcy and feminist jurisprudence.
Q. I am not asking whether those are your exclusive areas of focus, I am asking whether it is fair to say that those are your two major areas of academic interest.
A. I still would have to answer you that no, I don't think they are. I spent a considerable length of time serving as a special representative in the Integrated Resources Chapter 11 case, which is one of the largest Chapter 11 cases in the United States, and in that context had lots of opportunity to both think about and address issues that are not in the consumer arena.
Much of my writing, including in my book to which you have referred, is not in the consumer area

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and involves issues of Chapter 11. Some of my empirical work has also been in the Chapter 11 area.
My Bar Association work, particularly for the American Bar Association, where I have chaired and co-chaired a variety of committees for the business bankruptcy committee, are business-oriented.
But, as you may know, the last few years Congress has been considering bankruptcy reform, the principal piece of which has been consumer bankruptcy. And with the plethora, the huge number of bankruptcy filings, I have been approached frequently by the media, television, radio, newspapers, magazines to talk about what's been happening right now in the world of bankruptcy reform.
And so, I think it is fair to say that some of my recent commentary has been responsive to that crisis, really, that people have perceived in the world of consumer bankruptcy.
And as to the writings, the feminist writings, I do write and think about those people who are less privileged, and I did spend a sabbatical working with debtors, individual debtors at the Legal Aid Society, and I do care about educating those who are in the bankruptcy system. So, I am, in my pro bono

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life, have been involved with those who are less privileged and I am not embarrassed about that work; indeed, I am very proud about it.

Q. Professor Gross, there is a copy of your CV attached to both your original expert report and your supplemental expert report in this case; is that right?

A. Yes.

Q. And I will put in front of you what have been marked as Exhibits 1 and 2 for purposes of this deposition.

Does Exhibit 1 appear to you to be a copy of your expert report in this case?

A. I would say the cover sheet looks like it. Do you want me to --

Q. You are free to pick it up and flip through it.

MR. MUNSON: Excuse me, Mr. Fink. If you are changing subjects, we have been going a little over an hour. I would like to take a short break.

MR. FINK: Yes. Certainly, counsel.

THE VIDEOGRAPHER: We are off the video record at 9:53 a.m.

(Recess.)

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THE VIDEOGRAPHER: Hold on. We are back on the video record at 10:08 a.m.

Q. Professor Gross, before the break I handed you two exhibits.

Before we turn to those, I asked you earlier about whether you had worked on mass tort bankruptcy cases, either at Arvey Hodes or Weil Gotshal.

Just so I am clear, have you, in addition to your academic work since 1984, have you engaged in any private practice?

A. I am sorry, since I started teaching?

Q. Yes.

A. Yes, I have. Well, let me be very clear. I have been engaged in some law practice. I have also been appointed by a court to serve in a court-appointed capacity. And then, as I have discussed earlier, I was involved as a consultant in a class action.

Q. A court-appointed capacity, that is your role as special representative in the Integrated Resources case?

A. Yes, I was appointed by the court to serve as a special representative in the Integrated Resources Chapter 11 case which was pending in the Southern District of New York.

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Q. Integrated Resources was not a mass tort bankruptcy; right?

A. As I earlier defined mass torts, mass torts was not the central issue in Integrated Resources.

Q. It was not an issue at all in that case; was it?

A. Integrated Resources, while an immensely complicated Chapter 11 case, interestingly, involved many of the same kinds of issues as arise in a mass tort case, though is not itself a mass tort case.

Q. Have you worked on any mass tort cases since leaving Weil Gotshal?

A. Other than the mock hearing which I do with my students -- which involves a mass tort issue -- other than that, I have not been engaged as a lawyer in a case involving mass torts.

Q. So, you have never worked as a lawyer on any case involving mass torts pending in any court; isn't that right?

A. My experience as a bankruptcy professional has involved a number of issues that are raised in mass tort cases; indeed, one of the interesting features of bankruptcy is that large cases and small cases have many of the same issues. But I have never been a

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lawyer in a mass tort case, as I defined mass tort earlier.

Q. Now, I will ask you to turn back to the two exhibits that I put in front of you.

Please feel free to flip through them or do what is necessary to answer my preliminary questions, which are just, first: Is Exhibit 1 a copy of your expert report in this case? I am not asking you to verify that every page is there.

A. Without going line by line, it looks to be a copy.

Q. Certainly. I am certainly not trying to trick you. If you find that there is a page missing or something, we will fix that.

Exhibit 2, is that a copy of your supplemental expert report with the cover letter attached to it?

A. It looks to be a copy, without going page by page.

Q. All right.

Would you turn to Exhibit A of your supplemental report. The reason I smiled is because Exhibit A to Exhibit 2, and I was worried about that. In any event, is that a copy of your CV?

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A. Yes.
Q. Is that your current CV?
A. It was current as of the date it was submitted and I keep doing things; so, there may be a thing or two of late that is missing, but it was, as of the date it was done, the most recent.
Q. So, this was your current CV, as of May 5th, 2000?
A. Yes.
Q. There is also a copy of your CV attached to your original report in this case. Had it been updated in the interim?
A. Yes. The original CV was completed for the first report, which I believe is dated in November. And so, between November and the date of the second report I engaged in various activities; and so, I updated the CV to look like those.
Q. I don't want to turn this into a laborious process, but do you know what alteration has been made to the CV, from the first iteration to the second? If you don't, that is fine.
A. Yes, I do know.
Q. Can you please tell me what those are.
A. I may not capture every single one of them.

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Q. That is fine.
A. One of them is that I became a member of the planning committee of the Freestanding Bankruptcy Workshop.
I am the chair of the Association of American Law Schools Bankruptcy Section and I have also served on a planning committee between the date of the first CV and now, on a planning committee for planning a workshop for bankruptcy law professors. And I, along with three other law professors, developed an entire, freestanding, two-day workshop for what we thought bankruptcy law professors should know and learn about and think about in their professional capacities.
So, that is one change.
Another change, if memory serves, and if you want, I can go through this.
I was invited to the University of Maine Law School, where I served as the Gottfried distinguished lecturer, and in that capacity I went to the University of Maine for several days and that happened in that same interim period.
I also gave several speeches that were not reflected on the original, because they had not yet been given, but they have since been given, and those

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appear under "invited presentations."
Q. Which presentations are those?
A. Those are the ones that appear on page 7 of the new revival.
Q. Anything else?
A. I think this bio contains an added section detailing my non-law school teaching experience.
Q. This bio being the revised one?
A. The more updated one --
Q. Okay.
A. -- has a section relating to my teaching experience, in addition to that, which I have done as a law professor, everything from serving as a teacher trainer in the Philadelphia public school system, and I think the one other change is that I spent a good portion of this past winter living in Vermont, and in that context I both developed and taught a course for people in the Getting Ready to Work program, which is welfare people.
And it was a course for both parents and children called Making Sense of Sense, and it is a course about helping people develop a better understanding of money and the credit world in which we live. And it is designed to empower people to not only

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be more knowledgeable but to be better participants in our market-based economy. And that is also reflected in this new resume.
Q. Okay. If you turn back to page 2 of the resume.
A. The supplemental one?
Q. Yes. There is a listing that begins on page 2 of your publications over the last ten years; is that right?
A. Yes.
Q. Are there any of these publications that are listed here that you consider particularly relevant to the opinions that you have been asked to give in this case?
A. I would say that almost everything that I write informs my thinking, informs my understanding of the bankruptcy system, informs my sense about the way the system should operate, the integrity of the system.
So, I would say, in that sense, everything that I write, that I think about has informed what I do here and what I am speaking about today.
Q. Okay. So, your resume is a seamless web.
My question is whether there are any

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publications listed here that you consider particularly relevant to the opinions that you have been asked to give in this case.

MR. MUNSON: Objection. Asked and answered.

Q. I think your counsel will tell you that you are free to answer.

MR. MUNSON: You are free to answer.

A. My answer is no different now than it was before. Everything that I write is relevant to what I do. Almost everything that I write.

Q. Professor, the third entry under "books" is Lady Lucy's Quest, children's fairy tale. Can you tell me how Lady Lucy's Quest has formed the opinions that you have given in this case?

Would you agree with me that that is not as relevant to your opinions in this case as some of your other writings?

A. Actually, I don't agree with you that it is irrelevant. It may not be as central. It is a story that I wrote during my sabbatical and, interestingly, it is about law and it is about a young girl who wants to become a knight in medieval times and she is told that she can't become a knight and she asks why and they tell her that knights have to take three tests,

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and the story is about her taking and passing the three tests.

So, it is really a story about fairness and about treating people equitably and about giving people the rights they deserve.

And while it is in the form of a children's fairy tale, that's what I think about both in my personal life and in my legal life. So, Lady Lucy's Quest is, at some significant level, related to my thinking about fairness and equity and integrity, which is what I am talking about here today.

Q. So, your opinion in this case is about fairness, equity and integrity; is that right?

A. I am talking about a lot of things in my expert report.

And among them are how the bankruptcy system has operated here from the very beginning of the Johns-Manville case up through the plan, up through the creation of the trust, through consummation and then implementation. And it is about that continuum of issues that relate to fairness, in terms of the treatment of creditors, the integrity of how the bankruptcy process worked and what information was available and not disclosed and about whether and how

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the bankruptcy law was implemented.

So, in that sense, the buzz words of my children's feminist fairy tale are words that inform and underlie the many opinions that I have set forth in these two reports.

Q. How do these notions of fairness, equity and integrity impact on the trust's ability to recover from the tobacco industry in this case?

A. First, there is an underlying assumption in your question that the trust is entitled to recover from the tobacco industry. And I think that is the issue that is actually being litigated, which is: Is the trust entitled to recover from the tobacco companies.

Um, but to -- to figure out the answer to whether or not the trust should be able to recover, those three words are really touchstones for understanding a process, a history. Um, and if you don't understand that history, you can't understand the ultimate answer.

And so, in thinking about that history, the trust's financial condition, what parties knew about the trust's economic flaws, how that trust operated in the period between confirmation and consummation and

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then afterwards, all of that relates to issues of fairness and equity and integrity.

Q. Well, in your view, what's the impact of how the trust operated at various points in time on the trust's ability or entitlement to recover in this case?

A. Could you repeat the question, I am sorry.

Q. In your view, what's the relevance of how the trust operated at various points in time on the trust's ability or entitlement to recover from the tobacco industry in this case?

A. Let me start by saying that there is a, the same presumption in that question that the trust is entitled to recover and I -- that is something I am not comfortable saying; indeed, for me that is really the issue that is being litigated.

Q. Let me rephrase the question, if I can, because I want us to be on the same ground.

MR. MUNSON: Excuse me. Let the witness finish the question, if she is not finished.

Q. I apologize.

A. But what happened to the trust over time is extremely relevant, indeed central to being able to understand why the trust is in the position that it is in today.

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And the reason that it is relevant is you can't just look at the trust today acontextually and understand how it got to where it is, if you don't go back in time and figure out how it got to where it is.

And what I am saying, in essence, then, is that who got paid, and how much they got paid, and why they got paid is an answer that spans a period of time and you can't answer it today.

So that what's in my report about anything from the beginning of Johns-Manville's bankruptcy up through the implementation of the trust all informs the ultimate question about is the trust entitled to recover anything from the tobacco companies.

Q. Is it your view that the trust's conduct over time somehow impacts on whether or not people got sick as a result of the tobacco industry misconduct?

MR. MUNSON: Would you read that question back again -- I may have missed it myself.

(Record read.)

A. Before I answer the question -- let me say that there are certain presumptions embedded deep in that question about did the tobacco companies have misconduct. And a second presumption is that people were injured because of tobacco, and I don't think

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those are ones that I have been asked to opine about.

So, if we could take those out of the question and just give me the first part of it.

Q. I will ask you to assume those two to be assumptions to be true.

MR. MUNSON: Which two?

Q. That the tobacco industry engaged in misconduct and that people were injured as a result.

A. And then could you just repeat the part that you would like to know about.

Q. My question is whether, in your view, the trust's conduct over time impacts on whether people were injured as a result of the Tobacco Company misconduct.

MR. MUNSON: Objection to the question on the grounds that it is compound and unclear to me which people being injured you are referring to.

MR. FINK: The trust claimants.

MR. MUNSON: As opposed to the trust?

MR. FINK: Well.

MR. MUNSON: Is that right.

MR. FINK: There are sick asbestos workers out there that are bringing claims against the trusts today.

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Those are the people, assuming people were injured, those are the people that I would like you to assume were injured, asbestos workers asserting claims against the trust.

A. I am not trying to be difficult. I am not sure I understand the question that is actually being asked here.

MR. MUNSON: Can you try to --

A. Is there a different way to ask it?

Q. I understood your testimony to go on to say that the trust's entitlement to obtain relief in this case is dependent, to some extent, on the trust's conduct over time. And my question to you is simply whether, in your view, the trust's conduct over time has impacted on whether or not trust claimants have become sick as a result of the tobacco industry misconduct.

A. Let me say that I, apart from not agreeing with the presumptions about tobacco causing people to be ill, as I understand what you are asking me, and to the best of my ability to answer what I take to be the question: At the end of the day, the trust doesn't have enough money and there are lots of factors that contributed to the trust's not having enough money at

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the end of the day.

And there are lots of reasons why, which are detailed in my report, why the trust ended up in the position that it ended up in. And none of those reasons relate to anything that the tobacco companies did.

Q. Is that your answer?

A. Yes.

Q. Well, I appreciate the background, but I don't think that you are answering my question, which I have to admit that I don't think it is such a difficult one.

MR. MUNSON: Counsel, let me object to your arguing with the witness. If you want to try your question again, feel free; but I don't think it is appropriate to argue with the witness.

MR. FINK: I understand the position, counsel.

Q. My question, Professor Gross, is whether or not, in your view, the trust's conduct over time has affected whether or not trust claimants have become ill as a result of Tobacco Company misconduct.

A. Um, I think I answered the question before. People got ill, as I understand it, for lots of

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reasons.
And if you are asking me did the trust itself make them ill, no, the trust itself did not make them ill. What the trust did is the trust behaved in certain ways and made certain choices that made it difficult, if not impossible, for lots of people who were ill to get paid. That's what it did.
But if your question was, did the trust itself make them sick, no, the trust did not make them physically sick.
Q. The trust received whatever assets it has received from the Johns-Manville corporation; is that right?
A. Well, the trust is funded not at a single point in time and it got and gets certain assets from Johns-Manville, and then it is obligated to oversee and grow those assets and handle those assets in an appropriate fashion.
Q. And the assets that it received, as a result of the Johns-Manville reorganization, were inadequate to pay all of the tort claims against the trust; isn't that right?
A. What I think is true is that it is not just a question of assets, it is a question of the structure

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of the trust itself, together with the amount of the assets, together with the way the trust operated and was administered.
All of those things, together, contributed to the trust's financial collapse. And it is not just that the assets were insufficient, it is that the structure of the trust in which those assets were placed had certain deep fundamental structural flaws.
Q. But would you agree that the assets were insufficient?
A. Insufficient to?
Q. Pay all of the tort creditors in full.
A. One of the most interesting and difficult parts of this case is that there was an obligation to pay past, present and future claimants and the amount of money that the trust got was supposed to be sufficient to pay all of those people over the course of time.
And that is people who were not presently ill but would become ill. And the problems with the trust related to not only the amount of assets, but what were done with those assets, and the way that claims were handled, and the way that the trust operated. And, in addition to that, the number of claims that came in to

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being.
So, I can't say that it was just, that it is just the dollar amount alone from Johns-Manville that accounted for the trust's problems. It was not just that.
Q. Professor, my question is not whether it is the only factor, my question is whether the assets that the trust received from the Johns-Manville bankruptcy were sufficient to pay all of the tort creditors that have eventuated and will eventuate over time in full.
A. I want to just go back to the answer that I gave. The assets grow, and they grow in two ways: They grow in terms of the trust's handling of them and then they also grow because Johns-Manville was under an ongoing obligation to keep certain money flowing from it into the trust; and, indeed, there is a connection between Johns-Manville and the trust, in that the trust has a stake in the success of Johns-Manville.
And so, I don't think one can say that it was per se, on its own, in and of itself, not enough. What's true is that it was not enough in light of a lot of things that happened over the course of time.
Q. So, is it your view that if the trust had done a better job at managing its operations, that it

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would have had sufficient funds to pay all of the tort claimants against it in full?
A. This involves much more than just how the trust managed its operations.
This has to do with many more factors than that. It has to do with how the trust was created, how the trust was influenced, how the trust was restructured, how the trust operated -- all of those factors. All of those cause and effect factors lead to the situation where you have an entity, at the end of the day, that is fundamentally flawed.
Q. Professor, before we digressed somewhat, we were speaking about your publications. I will ask you the question: We were speaking about Lady Lucy's Quest; do you recall that?
A. Aha.
Q. Please answer yes or no.
A. Yes, we were.
Q. Are any of your other publications more relevant to the opinions that you are giving in this case than Lady Lucy's Quest?
A. That is presuming she is not relevant. I think I indicated, when you asked me before about the relevance of my publications, and I think I would tell

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you what I told you then.
When you boil it all down, what I write about and think about is how a system, namely the bankruptcy system, operates and how people are treated within that system.
And I think about whether the system works well and fairly and equitably and with integrity. And I think about that in everything that I write about; and so, at that level, most of my thinking, most of my writing is about the very kinds of issues that I am being asked to think about in the context of this trust and this matter.
Q. But I will ask you again, and I will tell you that a yes or no answer would help, you are certainly not compelled to give one, whether or not you think any of your other publications are more relevant to your opinions in this case than Lady Lucy's Quest.
A. One might not want one's ultimate academic career to be defined by a children's fairy tale, written on a sabbatical.
But I have to say that I have written a number of articles and I have written a prize-winning book, and I have written lots of pieces that cover a large span of material. And I would say that, at the

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level at which we are talking, the themes of those works, whether they be a children's fairy tale or a prize-winning book and an article, relate to similar issues.
And so, I would not pick -- personally, I would not pick one of my works and say it is the one work that relates to this.
I have a body of work and it informs my thinking, and it informs my scholarship; it informs my teaching and it informs my being an expert here.
Q. Other than Failure and Forgiveness, do any of your other writings listed here expressly address the issue of mass torts?
A. In the sense that mass tort cases raise issues about how the bankruptcy system should deal with complex problems and how well Chapter 11 does or does not function, in that sense there are certainly other articles that speak to how Chapter 11 works and those issues, in many ways -- a mass tort case and other Chapter 11 cases -- have remarkable similarities.
Bankruptcy has one chapter for corporate reorganization, Chapter 11, and it deals with all kinds of cases. And with the one exception of railroads, there is no special Chapter 11 for certain industries.

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So, as I think about Chapter 11, it certainly informs my thinking about mass torts in the context of Chapter 11.
Q. Are there any bankruptcy code provisions that specifically relate to the asbestos industry?
A. Well, there are a variety of provisions that affect all chapter 11s. There is one more recent provision related to the channelling injunction, which is a sort of a term of art, but it relates to how to deal with tort claimants, claims after the plan has been confirmed.
And what is really the aftermath of bankruptcy, and that one provision has the kind of specificity as to mass torts.
Q. Other than Failure and Forgiveness, does the phrase "mass tort" appear in any of your publications?
A. I would have to -- I have written a lot, as you can see, and I edit a chapter of Colliers, which one is of the leading bankruptcy treat tests on involuntary bankruptcies, and I would not say with certainty, one way or the other, whether the term "mass torts" shows up either in that chapter of the treatise or in some of my other articles that discusses overviews of the bankruptcy system in the United

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States, or legislative developments, or proposed legislation.
So, I can't say with certainty whether or not the term appears in other of my writings, one way or the other.
Q. Do you understand the Johns-Manville reorganization to have been a mass tort bankruptcy? Do you understand that?
A. Yes, I understand that. But it is, above all else, a Chapter 11.
And one of the interesting features of a Chapter 11 is there is only one of them, and other than very, very small cases, Chapter 11, for better or worse, is a one-size-fits-all chapter.
And so, while it is a mass tort case, Integrated Resources was a massive case and they, and other big cases -- and, indeed, other small cases -- have, as I have indicated, remarkable similarities.
Q. Professor, other than the Johns-Manville bankruptcy case, can you give me any examples of other mass tort bankruptcies?
A. Other cases?
Q. Other bankruptcy cases, other debtors.
A. Well, there have been a variety of mass tort

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cases. AH Robins is one that comes to mind. Piper is another that comes to mind.

And I think that there have been other asbestos companies that have had to seek bankruptcy relief subsequent to Johns-Manville, and then there are a group of other mass tort cases in the environmental area involving environmental torts.

So, I would say asbestos, airlines, product liability, those are the ones that come to mind at present.

Q. Other than the Robins bankruptcy, the Piper bankruptcy and the Johns-Manville bankruptcy, can you identify, by debtor, any other specific mass tort bankruptcies?

A. Um, I am blanking on the exact names of some of the asbestos bankruptcy cases. I think there is one in Raymark, and I think there is one in Porter, and there is one -- I am not trying to have a memory lapse here, but there is one that starts with an F.

Q. Fuller Austin?

A. I don't remember the name. There have been other asbestos company bankruptcies.

Q. The videographer has about two minutes left on his videotape.

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If you are done with your answer, this is probably a good time to take a quick break.

THE VIDEOGRAPHER: We are off the record at 10:58 a.m.

We are off the video record at 10:58 a.m.

(Recess.)

THE VIDEOGRAPHER: We are back on the video record at 11:19 a.m.

Q. Professor Gross, before we took that break we were listing some mass tort bankruptcy cases, if you will.

Other than Failure and Forgiveness, do any of your publications discuss -- and I am not asking you whether they cite in footnotes -- but do any of your publications discuss the mass tort bankruptcies that we just talked about, being the Manville, Robins, Piper, Raymark, or Porter mass tort bankruptcies?

A. Other than footnote references, I don't recall specific references to the case that you are naming.

Q. Other than footnote references, do you recall references in any of your publications, other than Failure and Forgiveness, to any mass tort bankruptcy case?

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A. I would have to go back and look at some of the articles that specifically, and in detail, address Chapter 11 and the Chapter 11 process and the definition of claim and the nature of claim.

So, I can't, without going back specifically, tell you whether there is some reference to the concept of mass torts.

If it is not explicit, it may be implicit in the discussion of the nature of Chapter 11, the use of Chapter 11, amendments to the bankruptcy code, the nature of the bankruptcy process.

So, I can't say for certain. I am uncomfortable saying that it is not there at all.

Q. But is it fair to say that, as you sit here today, you cannot recall any instance in which any of your publications, other than Failure and Forgiveness, have discussed mass tort bankruptcies, explicitly?

A. Well, other than in footnotes and because there are certainly cross-references to footnotes, which are elaborating points.

If you are saying is there a specific textual reference to mass torts other than Failure and Forgiveness, there is not one that I can recall, as I sit here right now.

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Q. That was my question.

Thank you.

If I asked you the same question about asbestos bankruptcies, would you give me the same answer?

A. Do you want to just ask the question.

Q. Other than in footnotes, do you recall any textual discussion in any of your writings about asbestos bankruptcies?

A. I recollect specific discussions about the uses of Chapter 11, the checks and balances system in Chapter 11, the nature and treatment of claims in Chapter 11, and in the context of those articles I don't specifically recall whether the words "asbestos bankruptcies," as a specific term, shows up. I just don't recall.

To be fair, I would have to go back and look at all of the things that I have written to see if those specific words show up. The concepts of check and balance, Chapter 11 claims, the nature of Chapter 11, the operation of Chapter 11, all of that is discussed in several of these articles at some length.

Q. All right. I guess my question is not limited to whether the words "asbestos bankruptcy"

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appear, but whether there is actually a discussion of asbestos bankruptcy cases that you can recall, not in footnotes but in textual discussions and in your publications.

A. My articles on Chapter 11 and the bankruptcy process deal with how Chapter 11 operates and functions and its strengths and its weaknesses, and those topics do affect all Chapter 11 cases, including asbestos cases.

I don't know that I singled out asbestos cases for specific mention. Again, I would have to reread them to see if I specifically used asbestos as an exemplar, as opposed to some other exemplar.

Q. Do any of your publications address the topic of mass tort claims administration?

A. Some of my articles discuss case administration and how to handle and how Chapter 11 operates, including how claims and creditors are handled. I don't know that my writing uses as an example, specifically, the administration of mass tort claims.

Q. Do any of your writings address the topic of class action settlements?

A. Yes. Some of the articles discuss the

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settlement and resolution of class actions in the consumer bankruptcy context.

Q. Do any of your writings address class action settlements outside of the consumer bankruptcy context?

A. Perhaps let me clarify the earlier answer.

Several of my articles address large class action settlements in the context of creditors who have acted in ways that are suspect towards consumers. So, some of my articles do address those types of very large class action settlements.

Q. None of your writings address class action settlements in the mass tort context; do they?

A. Other than perhaps in footnotes, I am not aware of a discussion of mass tort class action settlements specifically, as opposed to any other kind of class action.

Q. Do any of your writings address tobacco litigation?

A. Could you just clarify for me what you mean by "tobacco litigation"?

Q. Sure. Do any of your writings address the topic of lawsuits that have been brought against the tobacco industry?

A. No.

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Q. Professor Gross, you had occasion to testify before Congressional committees and the National Bankruptcy Review Commission; is that correct?

A. That is correct.

Q. Would you turn to page 7 of your CV. There is a section entitled "invited testimony selected"; is that right?

A. Yes. That is, that section is there.

Q. That section addresses your congressional and National Bankruptcy Review Commission testimony; is that correct?

A. Yes.

Q. Is that an exhaustive list of your Congressional and National Bankruptcy Review Commission testimony?

A. It is an exhaustive list of my oral testimony.

Q. I am sorry.

A. It is not a list of everything that was in writing that has been submitted to either Congress or to the National Bankruptcy Review Commission.

Q. The testimony that is listed here on your CV, am I correct in understanding that it all relates to the general topic, consumer bankruptcies?

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A. No. It doesn't all relate to consumer bankruptcy.

Q. Can you point out to me the entries here that do not refer or do not relate to consumer bankruptcies?

A. The testimony related to the bankruptcy study results does not relate exclusively or, indeed, primarily even to consumer issues.

And the testimony related to the effect of HR 833 on women and children also is more expansive than pure consumer bankruptcy.

Q. What is, or what was HR 833?

A. That was the then pending House bill related to bankruptcy reform.

Q. And your testimony about bankruptcy study results, what was the subject of the study that you conducted or that you testified about?

A. The study looked at the way in which various aspects of the bankruptcy code were being applied and implemented and it looked at the effects of an empirical assessment of how those particular, how certain particular provisions were operating in the bankruptcy system.

Q. Did any of the testimony that is outlined here in your CV address the topic of mass torts?

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A. The testimony before the Senate and that study looked at, among other issues, how section 362, which is the automatic stay provision of the Bankruptcy Code, how it operated. And to the extent that that section has applicability to a broad range of cases, including Chapter 11 cases, it would encompass, it is of equal application to a variety of contexts, including mass tort cases. But my testimony wasn't specifically about mass torts.

Q. In your testimony, with respect to section 362, the automatic stay provision, did you make express reference to mass tort cases?

A. No. This was not part of what I was studying.

Q. As I understand your testimony, in addition to the items that are listed here, you have given some testimony in written form on occasions other than what is listed here; is that right?

A. Yes. In other instances I am aware that aspects of my work have been brought to the attention of various legislative bodies at various times.

Q. Focusing now just on your express testimony, and specifically the written testimony that is not listed here, did any of that expressly address the

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topic of mass torts?

A. The express testimony that is listed here did not explicitly speak to issues of mass torts.

Q. Right. And I guess my understanding, in addition to what's listed here, and maybe I am not understanding, is that you also provided testimony to either Congress or the National Bankruptcy Review Commission in written form and that that testimony is not listed here; am I correct in that understanding?

A. Well, it is accurate that there are written submissions accompanying various of these. It is also true that some of my other writings have been presented to Congressional bodies in various forms and various symposium issues in which I participated or written things that people believed would be relevant have been submitted to Congresspeople on a wide range of issues.

Q. Thank you. You clarified my confusion. Did any of the testimony that is listed here on your CV address asbestos bankruptcies explicitly?

A. When I am asked to testify, I don't pick the topics. They ask me what I would like to testify about and they did not ask me to testify about asbestos.

Q. Am I correct in understanding that none of the testimony reflected here explicitly related to

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asbestos bankruptcies?

A. Some of the issues in the Senate testimony could affect asbestos cases, but it was not specifically testimony about the asbestos cases.

Q. You have never testified before Congress or the National Bankruptcy Review Commission about tobacco litigation; have you?

A. We are talking there about --

Q. Lawsuits brought against the tobacco industry.

A. I have not testified before Congress about lawsuits brought against the tobacco industry.

Q. Your CV also lists a number of presentations and speeches that you have given; is that correct?

A. Yes, it does.

Q. Have any of the speeches or presentations that you have given, which are listed in your CV, explicitly addressed the topic of mass torts, that you recall?

A. I am sure that some of the presentations that I have done and some of the teaching that I have done to groups have involved mass tort issues. A number of the programs in which I participate have a variety of units that one teaches and some of those have involved

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mass tort issues.

Q. And I guess my question is, of the presentations and speeches listed in your CV, can you point to any one of them that you specifically recall involve your speaking about the issue of mass torts?

A. All of the times that I have given presentations to the Eastern District of Pennsylvania Bankruptcy Bar and all of the ones to the Southern Florida Bankruptcy Bar Association are programs that encompass multiple problems which the group covers over a one- or two- or three-day period. And over the years that I have done both of those programs, mass tort issues were covered in those programs and I was responsible for leading those discussions.

Q. Do you recall what mass tort issues you addressed in those presentations?

A. I have a very general recollection and they covered issues of the nature of claims, the definition of claims, future claimants and, more generally, the way, the intersection, the relationship between mass tort cases generally and Chapter 11 generally.

Q. Have any of your speeches or presentations specifically addressed the topic of mass tort claims administration?

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A. Some of these sessions that I am describing, that topic was raised, in the sense that participants at these programs who are lawyers, many of whom have years of experience in bankruptcy, would speak about their own experience in mass tort cases in the context of discussions that we had.

Q. My question is whether any of your presentations addressed the topic of mass torts claims administration.

A. I did not specifically make the subject matter of a presentation mass torts administration. But having said that, I am sure the issue came up in some of these discussions of mass torts.

Q. You have performed empirical research in connection with bankruptcy issues; is that true? Have you?

A. Yes.

Q. Has any of your empirical research focused on issues relating to mass tort bankruptcies?

A. No. My empirical research hasn't had mass torts as its specific focus.

Q. Okay. You mentioned earlier that in teaching your courses you have a mock hearing, if I am characterizing it right, that that has to do with mass

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torts; is that right?

A. That is correct.

Q. Can you describe for me what that mock hearing is, what the subject of it is?

A. The subject of the hearing is a motion to lift the automatic stay which springs into being in all bankruptcy cases and whether or not that stay should be lifted in the context of a particular personal injury claimant.

Q. When you say it is a mock hearing, am I correct in understanding that students argue both sides of that issue?

A. No. Actually, it is different from a traditional mock hearing. Importantly different. I argue, as does another very experienced bankruptcy litigator, and we change sides from year to year and the purpose is to allow the students, unlike a normal mock hearing, but to allow students to hear more sophisticated bankruptcy professionals who are expert at arguing before a court.

Q. You just made reference to, I think it was your colleague as being a bankruptcy litigator; is that right?

A. The --

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Q. The other participant in the mock hearing.

A. Yes.

Q. Okay. Are you a bankruptcy, or were you when you were practicing at Weil Gotshal, a bankruptcy litigator?

A. Bankruptcy lawyers define themselves differently. While I did litigate, I would not have defined myself, per se, as a bankruptcy litigator, although some bankruptcy professionals just litigate and some do not. And I did a combination.

Q. Just so I am clear, did you ever, in your law practice, function as a litigator, outside of the bankruptcy context?

A. Early in my career as a summer associate, I may have worked on a few litigation matters that were not specifically bankruptcy-related in the course of my summer at the law firm.

I may well have seen other kinds of litigation and certainly have seen, although not participated necessarily, seen other types of litigation.

Q. But other than your service as a summer associate, am I correct in understanding that you did not consider yourself to be a litigator?

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A. That is correct. I don't consider myself to be a litigator.

Q. Have you had occasion, going back to the bankruptcy context, have you had occasion to stand up in court and argue for a client?

A. Yes, I have.

Q. And was that while you were working at Weil Gotshal?

A. It was also, I had occasion to stand up and argue in court, both while I was at Arvey Hodes and while I was at Weil Gotshal, and subsequent thereto I argued in the context of the Integrated Resources Chapter 11 case, where the bankruptcy judge asked for my testimony on several occasions.

Q. Have you ever had occasion to advise a client whether or not to initiate litigation?

A. Yes.

Q. And you have given such advice on one occasion or more than one occasion?

A. Since I have been out of law school, I have amassed, on many occasions -- I have been asked, on many occasions, whether a client should sue.

Q. Did any of these requests for advice come up in the context of the Chapter 11 bankruptcy?

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A. Yes. They have come up in the context of a Chapter 11, absolutely.
Q. And again, in one instance or more than one instance?
A. In my representation of both debtors and trustees and creditors it was not uncommon to think about how one should resolve a problem and whether litigation was, in that instance, the wisest, most appropriate, best course of action.
Q. And when called upon to give such advice, what considerations would you bring to bear on such a problem?
A. I think a number of factors go into making choices about whether or not to litigate, including the specific facts in a given case and the particular context in which those choices are being made.
And so, I made -- I thought about, with a number of clients, whether in a particular context, with a particular set of facts, litigating was the appropriate solution.
Q. Are there certain factors that you would take into consideration, each time the question whether or not to initiate litigation arose?
A. I think there are a variety of factors that

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one takes into account, which include why it is one might sue, what it is one is trying to achieve, how long it would take, how much it would cost, what would be the likelihood of success, as well as the particular parties involved in a given case, the particular dynamics of a situation, the short and the long term impact of that litigation, how that litigation fit into one's overall strategy and goals, both long-term and short-term. One's resources.
I would say all of those factors, among others, are the things that you would take into account.
Q. Did you ever advise any client whether or not to bring a lawsuit against the tobacco industry?
A. No.
Q. Okay. Have you ever performed any work for a mass tort claims resolution facility?
A. No.
Q. Have you ever been involved in creating a mass tort claims resolution facility?
A. No.
Q. Have you ever been involved in administering a mass tort claims resolution facility?
A. No, I have not.

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Q. Professor, I believe you mentioned earlier that you have been asked to consult on a class action and that we discussed that class action a little bit.
Other than this case, that we are here on today, the Falise case, and that class action, have you been asked to consult, as an expert, in any other cases?
A. Over my career I have been asked a lot to consult, as an expert.
Q. Have you, in fact, agreed to consult, as an expert, in other cases?
A. I have been asked on a lot of occasions and have said no.
Q. Right. So my question is, just so I am clear, is that: In other than this case or the class action that you spoke about, are there any other instances where you served as an expert?
A. No. There are no other cases where I have agreed to serve.
Q. In that class action lawsuit, remind me again, I know you told me, who was the defendant?
A. The defendant is Sears.
Q. Okay. In the Sears litigation were you a testimonial expert?

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A. As of the present moment, I have not yet testified.
Q. Is the Sears litigation an ongoing litigation, as we sit here today?
A. Yes, it is.
Q. Have you been designated as a testifying expert in the Sears litigation?
A. I don't know the answer to that.
Q. You do understand the question?
A. I understand the question. I don't know whether I have been specifically, in writing, designated. I don't know the answer to that.
Q. All right. Have you ever testified at a trial?
A. Other than testifying in my own divorce case, I have not testified at trial.
Q. Setting that aside, have you ever testified in any administrative proceedings or arbitrations?
A. No.
Q. Have you been retained by Brown & Williamson in this case?
A. I have been retained as an expert by the tobacco companies.
Q. Brown & Williamson, in particular; right?

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A. Yes. I was contacted initially by Brown & Williamson. Actually by Kirkland & Ellis, on their behalf.
Q. On behalf of Brown & Williamson?
A. Yes.
Q. When were you first contacted?
A. I would say, in the late spring of 1999.
Q. Who contacted you at that time?
A. Ted Friedman of Kirkland & Ellis.
Q. Do you know, is Mr. Friedman a partner or associate?
A. He is a partner.
Q. Had you had any contact with Mr. Friedman before he contacted you about this case in the spring of 1999?
A. Mr. Friedman began his legal career in Chicago, as had I, and we had litigated against each other, and I knew him from that context. And over the years we had remained in contact professionally.
Q. Is it fair to say that Mr. Friedman is a professional acquaintance of yours?
A. Yes. That would be one way to characterize him.
Q. What was the nature of the initial contact;

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did Mr. Friedman call you or speak to you in person?
A. He called me.
Q. Do you recall what the substance of the conversation that you had with him at that time was?
A. In general, he asked if I might be interested in being an expert witness in a particular matter that his law firm was handling.
Q. Did you agree to fulfill that role, at that time?
A. No. I indicated to him that I would be happy to hear more about it and to think about it, once I knew more.
Q. What happened next?
A. Then one of Mr. Friedman's partners, David Bernick, found me.
Q. When did Mr. Bernick phone you?
A. I would say, shortly after I spoke to Mr. Friedman.
Q. What was your discussion with Mr. Bernick?
A. He indicated that there was a litigation in respect of which his firm was representing the tobacco companies and that it raised issues within my expertise and he wanted to know if I was interested in meeting with him further to chat about the possibility of my

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serving as an expert.
Q. Did you express such an interest?
A. I indicated that I would talk to him about it.
Q. Did you ultimately talk to Mr. Bernick or somebody else at Kirkland & Ellis in more detail about the case?
A. Yes. I ultimately met with Mr. Bernick to hear more about what he was seeking in an expert.
Q. Was this, generally speaking, still in the spring of 1999 time frame?
A. I would say the spring, perhaps by then, early summer of 1999.
Q. You met in person with Mr. Bernick?
A. Yes, I did.
Q. Was anybody else present at that meeting?
A. No.
Q. What was the discussion at that meeting?
A. He gave me a general overview of the nature of the complaint that had been filed and pointed out that it arose in a bankruptcy context and was I interested in thinking about certain of the issues in the case.
Q. Did you express interest at that time in

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serving as an expert in this case?
A. I think I expressed an interest, although I did not commit at that time.
Q. Did you have subsequent meetings with Mr. Bernick?
A. No.
Q. Did you have subsequent meetings with other Kirkland & Ellis attorneys about the case?
A. Not before I agreed to be retained as an expert.
Q. Did you review any documents before you agreed to be retained as an expert?
A. Yes. I asked Mr. Bernick to supply me with certain of the documents and told him that I wanted to think about them and think about what he had discussed with me before I agreed to serve as an expert.
Q. Is there anything else that you did, with respect to this case, prior to agreeing to serve as an expert?
A. Other than reviewing the material that he sent to me and thinking about the conversation we have had? I did not do anything else.
Q. Okay. I take it there came a time when you notified Kirkland & Ellis that you would, in fact, be

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interested in being retained as an expert?
A. Yes. There was such a time.
Q. When was that?
A. It was probably, I would say, in that same time sequence, late spring or early summer of 1999.
Q. Who did you communicate that to?
A. I communicated it to Ted Friedman.
Q. Other than Mr. Friedman and Mr. Bernick, I take it you have had occasion to meet with or speak with other Kirkland & Ellis attorneys; is that right?
A. Two of them.
Q. Are those two individuals sitting with us in the room today?
A. Yes, they are.
Q. Okay. Just so the record is clear, that is Mr. Munson and Mr. Reinstein?
A. Yes.
Q. After you agreed to serve as an expert in this case, what was the next work that you did in connection with the case or the next communication that you had, whichever came first?
A. There were several meetings in which the two lawyers from Kirkland & Ellis asked me a lot of questions and I asked to see a variety of documents of

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different kinds.
Q. When you say "the two lawyers," at this point are we talking about Mr. Munson and Mr. Reinstein?
A. Yes. And from time to time Mr. Friedman was there.
Q. Did there come a time when you were asked to draft an expert report for this case?
A. I was asked to write an expert report.
Q. Okay. Who asked you to write an expert report?
A. I would say Mr. Munson, primarily, asked if I would be interested in writing a report.
Q. Was that during a face-to-face meeting or a telephonic meeting?
A. I would venture -- I don't recollect. It was probably in person.
Q. Do you recall what was said by Mr. Munson about the subject of your report?
A. He basically indicated that they wanted certain questions answered and asked if I would be willing to answer them.
Q. Was there any discussion at that time about what the answers to the questions might be?
A. No. In fact, just the opposite. I told them

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that they would get whatever answers I thought were appropriate and those were the answers that they were going to get and if they did not happen to like them, that was their problem and not mine.
Q. All right. Did you then go about writing your expert report for this case?
A. Actually, before I wrote anything, I went about researching and thinking and analyzing a wide range of documents that I had asked for and continued to ask for, so that there was a long period of time before I wrote anything.
Q. But there did ultimately come a time when you reduced your report to writing?
A. There ultimately came a time when I answered the questions that I was asked.
Q. And you did so in writing?
A. Yes.
Q. And who drafted the report?
A. I wrote the report.
I answered the questions that I was asked and I wrote to the best of my ability, based on my analysis of all of the documents that I had read and my experience, as a lawyer and a professional and academic, and bringing all that together, I wrote what

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I thought to be the best answers to the questions.
Q. Did you, at some point, share a draft report with the attorneys at Kirkland & Ellis?
A. Yes. At one point, I showed them a draft.
Q. Did you receive any comments from Kirkland & Ellis on that draft?
A. They asked me some questions about what I had written.
Q. Did you go on to revise your report, based on those questions?
A. I am not sure "revising" is the word that I would use. I thought about their questions and I thought that some of what I had written could be made clearer or could be developed more fully. And so, I thought about their questions and took those into account, as I thought about what I had written.
Q. So, were there various iterations of draft reports before you produced the final product that has been marked here as Exhibit 1?
A. Not many iterations.
Q. Have you retained copies of any of those intermediate iterations?
A. No. I write over using my computer, and the last version; so, all I retain is the one that

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ultimately is produced.
Q. Have you had any contact with any other individuals who have been designated by the defendants in this case as experts in this case?
A. Have I ever?
Q. No. In connection with your work on this case.
A. No.
Q. Do you know who Peter Schuck is?
A. Yes, I do.
Q. Is he a member of the faculty at the New York Law School?
A. He has been a Harlan visiting professor at the law school over the last -- not this past year, but for several years or less.
Q. Have you met him in that capacity?
A. Yes. That's the capacity in which I have come to know Professor Schuck.
Q. Do you know whether Professor Schuck played any role in connection with your retention in this case?
A. I have no idea.
Q. In the course of preparing your report did you review various documents?

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A. In the course of preparing both reports I reviewed a number of documents, which are detailed at some length in the back of both reports.
Q. Right. For right now I am just talking about the original report. There is an exhibit, if you will, to your first report that lists your reliance materials; is that right?
A. Yes. It lists the specific documents that I looked at and, as the report indicates, I also relied on my own writing and my own experiences as a bankruptcy professional and as an academic to inform that which I wrote.
Q. Now, in gathering the materials that are listed in the annex to your report, are these all materials that you requested from attorneys at Kirkland & Ellis or materials provided to you from time to time, unrequested? How did that work?
A. I requested documents -- sometimes specific documents, sometimes documents -- covering certain subject areas that I wanted to hear about or read about. And I would make my requests and they would write down what I wanted and get me what I needed.
Q. In the course of preparing your report did you review any documents produced by the tobacco

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companies in this case?
A. I am not sure I know the source of some of the materials specifically.
Q. Did you review any internal --
Sorry. I did not mean to cut you off.
A. So, I would ask for documents. I wouldn't specify where they had to come from.
So, I don't know the answer to your question.
Q. I understand. I guess I can rephrase my question, maybe, if it will help. I will ask a different question.
Did you review any internal tobacco company documents in connection with your preparation of your report?
A. I am not aware of any internal tobacco company documents that I saw.
Q. Did you review any summaries of the history of what some have characterized as tobacco industry misconduct?
A. Sorry?
Q. Did you review any summaries of tobacco industry misconduct in connection with the preparation of your report?
A. There is an assumption in your question that

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there was some tobacco misconduct in what I looked at and what I was looking at was the plan and the trust and the way that the trust operated. That's what I was asked to be an expert about and I did not assess and haven't assessed tobacco company behavior.
Q. So, you did not review documents relating to claims that the tobacco industry is engaged in misconduct; is that right?
A. I am not sure that the tobacco industry has engaged in misconduct, which is an assumption underlying your question.
But I was not asked to look at what the tobacco companies did or did not do. I was asked to look at the Johns-Manville bankruptcy and the trust and how it was created and its fundamental financial flaw from the get-go, up through its operation and the people's knowledge about its financial flaws, terrible financial flaws, up through how the trust operated and the choices that the trust made and did not make over the course of time; and lastly, what happened when that trust was implemented. That's what I was asked to look at. That's what I focused on.
Q. Did you review, in connection with your preparation of your report, Judge Weinstein's opinion

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in the Simon case, addressing the issue of whether or not he has personal jurisdiction over B.A.T.?
A. I am not sure of the specific piece of litigation to which you are referring and which specific opinion.
Q. So, you are not aware of having reviewed the document that I just described?
A. I am not aware of that -- at least, as you have described it -- of that particular document.
Q. Fair enough.
Are you aware of a publication called the Journal of the American Medical Association?
A. Yes, I am aware of its existence.
Q. If I refer to it as JAMA, would you know what I am talking about?
A. Yes, I would.
Q. Have you reviewed, in the preparation of your report in this case, any JAMA articles describing any internal tobacco company documents?
A. I would have to look at the literally.
Q. To your recollection.
A. Literally hundreds of documents that I looked at, I don't specifically recollect reading a JAMA article, although there may have been articles from

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that journal that were referenced or cross-referenced in other material that I read.
Q. Did you review a book by Richard Kluger, called ASH's to ASH's?
A. I did not review the book per se, no.
Q. Did you review the report of the special master in the Minnesota State tobacco litigation addressing the issue of whether or not about approximately 39,000 documents had properly been withheld as privileged?
A. I am sorry, would you just repeat the whole question.
Q. My question is whether you reviewed a report prepared by a special master in the Minnesota state tobacco litigation, addressing the issue of whether or not approximately 39,000 documents had properly been withheld as privileged?
A. I don't recall. I did not read that report itself.
Q. You did review, did you not, the original complaint in the Falise case?
A. I read a variety of complaints in this matter and they changed over the course of time. I assume the first one I saw was the original.

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Q. I take it from your testimony that you have also seen subsequent complaints; you have seen more than one?
A. Yes.
Q. Have you reviewed a complaint in this case alleging Federico claims against the tobacco industry?
A. Yes, I read a more recent version of the complaint in which a RICO claim was added.
Q. You are generally familiar with the plaintiffs' allegation in this lawsuit; is that fair?
A. I think it is fair to say that I read the complaints and I can't opine as to what the plaintiffs particularly were thinking or have in mind. But I have certainly read the complaints.
Q. Have you reviewed any of the damage models submitted by Dr. Harris in this lawsuit?
A. While I have seen reference to his work in other things that I have read, I have not read his particular piece.
Q. What documents, if you recall, have you seen that made reference to Dr. Harris' work?
A. If I am not mistaken, I believe that the Dunbar expert report references Mr. Harris' work.
Q. You reviewed the Dunbar expert report in this

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case?
A. Yes, I have reviewed it.
Q. Have you reviewed any of the other expert reports in this case, in addition to your own and Dunbar's?
A. Yes, I have read several of the expert reports.
Q. Do you recall whose?
A. They are largely enumerated in the listing in the second supplemental report.
Q. I don't want to put you to the task. I can take a look at that at the break.
A. It shows you which of those I looked at with specificity.
Q. Fine. Do you have an understanding that the plaintiffs' theory in the case, that they have been injured because the tobacco industry misconduct, has caused more claims to be filed with the trust and claims of greater severity than would have been the case, absent the tobacco industry misconduct?
A. I am sorry, could you --
Q. Sure. Let me just ask you: Do you have an understanding of what the plaintiffs' view of the case is?

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A. I think it is fair to say that I have a sense of what it is that I think the plaintiffs are seeking, based on having read the various complaints as they have evolved.

But I wouldn't want to speak for how they would articulate their own sense of that which they are seeking or put words in their mouth.

I think they are the ones, or you all are the ones who are best able to articulate that which you are seeking.

Q. That is certainly fair enough. I would like to get a sense of what your understanding is of what the claimants are claiming in this case; so, what is your understanding of the claimants theory of the case?

A. At the most basic level, I think the plaintiffs are seeking to recover for shortfalls that the trust has and it is seeking recovery for those shortfalls from the tobacco companies.

Q. Do you have an understanding as to what the plaintiffs' position is as to how the tobacco industry has injured them?

A. Again, I have read the complaint and I wouldn't want to articulate someone else's theory. I know what I have read and I understand what they are

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putting in writing. I think that you all are much better at articulating your own theory for why it is that you think there is a lawsuit.

Q. Right. I guess I am asking you, as you sit here today, what's your understanding of how the trust says it was injured by the tobacco industry?

MR. MUNSON: I will object. I think you have asked this several times.

MR. FINK: I guess I am not clear as to what the professor thinks about it.

MR. MUNSON: You can answer, if you can, more fully than you have.

A. I could repeat for you what's in your own complaint, which is, it seems to me, my best evidence for what it is that you are seeking. And based on having read that complaint, I could reiterate for you what I understand to be what it is that you all want.

And I am not trying to be difficult, but I think you have to articulate your position and then my job is to think about everything and analyze it and assess it.

Q. Professor, do you understand your opinion in this case to go to the question of whether or not, I believe as you put it, the trust is entitled to recover

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from the tobacco industry?

A. I think both my reports go to the ultimate issue, which revolves around who got paid, how much they got paid and why they got paid. And if one can understand the answer to that, one can understand the answer to how the trust ends up in the position that it is currently in.

And understanding that question, then, helps one inform and, indeed, answers the question of is the trust entitled to money from the tobacco companies.

Q. How?

A. How? Excuse me?

MR. FINK: Would you read back the answer.

(Record read.)

A. How does my report do that?

Q. I want to know how knowing who got paid, why they got paid and how much they got paid answers the question whether the plaintiffs in this case are entitled to recover from the tobacco industry.

A. You can't understand how the trust got to where it is without understanding its history. It did not come into being in a vacuum. The trust did not end up with its problem suddenly, now. To understand how the trust got to where it is, so one can answer that

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question, you have to go back in time and figure out how it got to be where it is.

And to do that, you have to look at its flawed structure, which meant that it was financially incapable of functioning. You have to understand how it came to have that structure with all of its flaws.

You have to understand how parties knew about that and did not disclose it publicly. And then you have to know what people tried to do to remedy those defects and how those solutions still did not fix the fundamental flaws.

And if you can understand that, then you can understand how the trust got to be where it is now. And when you understand that, that tells you why they can't make up for those shortfalls by seeking a remedy from the tobacco industry.

I guess what I tell you is, if you had a baseball player who was a pitcher who one day couldn't pitch, to figure out why he couldn't pitch you have to have a lot of information about him, his past, how he got there, before you could understand him and his situation. That's what I am telling you.

Q. And if somebody clubbed that baseball player in the arm with a bat and broke his limb irreparably,

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his throwing arm, that would answer that question for you; wouldn't it?
A. You might want to know what happened to him in the past. You might want to know whether he had other injuries before then. You might want to know what his health was. You might want to know what his mental state was.
You might want to know why he was in a position that he was in. There is lots that you would want to know, other than what happened at an isolated point in time. You need --
Q. And despite all those factors that you just identified, the baseball player would still be entitled to sue the person who hit him with a bat; wouldn't he?
A. One can sue whomever one wants. Whether one is successful in that suit is the hard question.
Q. Okay.
MR. FINK: On that note, why don't we take a lunch break.
THE VIDEOGRAPHER: We are off the record at 12:36 p.m.
(Time noted: 12:36 p.m.)

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AFTERNOON SESSION
1:33 p.m.
KAREN GROSS, having been previously sworn, resumed the stand and testified further as follows:
CONTINUED EXAMINATION
BY MR. FINK:
THE VIDEOGRAPHER: We are back on the video record at 1:33 p.m.
Q. Good afternoon, Professor.
A. Good afternoon.
Q. Professor Gross, were you involved in any way in the Manville bankruptcy proceeding?
A. No, I was not.
Q. You weren't involved in the negotiation of the Manville plan of reorganization; right?
A. No, I was not.
Q. Were you involved in any way in the creation of the Manville trust?
A. No. I was not personally involved in the creation of the trust.
Q. And you weren't involved in any way in the Findley class action, either; is that correct?
A. In the --

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Q. Do you understand that there was a time when a class action lawsuit was brought, a suit which was ultimately settled leading to a mechanism for distribution of the trust assets?
A. Yes, I am aware of that.
Q. Did you have any involvement in that class action?
A. No, I did not.
Q. You are aware that the trust operations are currently governed by something called the trust distribution process?
A. The trust is governed by a variety of documents, amongst which are how to deal with the claims under the trust distribution process. But there are a lot of other documents that help the trust or go to how the trust operates itself, including documents that came into being when the trust was created, and those documents were appended to the plan of reorganization.
Q. Were you involved, in any way, in the negotiation of the terms of the trust distribution process?
A. No. I was not personally involved.
Q. If I refer to that document as the TDP, would

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you know what I am talking about?
A. I would want you to tell me whether you mean the TDP as it existed in the early 1990s or the TDP that it existed in 1995 and whether you meant its terms or how it was actually implemented versus its language. But if you just want to tell me which way you mean, I am happy to --
Q. Right now it seems like we are clear that TDP we can use to refer to the trust distribution process; is that fair? And with the clarification that you just made.
A. I am happy to let you use the term. I may need, to be clearer, to put it in a context, when you use the term, so that it is understood that what happened on paper and what happened in reality may not be the same thing, and that it evolved over the course of time. I want to make sure that we are talking about the same thing, at the same point in time and the difference between paper and reality.
Q. The class action lawsuit that led to the TDP was not a bankruptcy proceeding; was it?
A. That's an interesting question. There are a variety of complex jurisdictional issues that are at stake in all bankruptcy cases, and I have not been

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asked to look at how one might characterize a particular piece of litigation, and calling something a bankruptcy proceeding is one way of potentially categorizing it for purposes of determining whether or not a particular court does or does not have jurisdiction.

So, in that sense I am not comfortable referring to it, one way or the other. It did grow out of, if you are asking me was the class action unrelated to the bankruptcy or something, maybe I am.

Q. Let me ask you a different question. In connection with your work on this case, have you interviewed any of the participants in the Manville bankruptcy proceedings?

A. I have not personally interviewed any of the key participants in this case, no.

Q. Just so the record is clear, you have not interviewed any of the participants in the Manville bankruptcy proceeding; right?

A. I read the depositions of a variety of people who have been involved in the Manville case, but I have not personally interviewed the people.

Q. Nor have you interviewed any of the individuals involved in the negotiations of TDP; have

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you?

A. In the context of this case?

Q. Yes.

A. In the context of this case, I have not interviewed those participants; that's correct.

Q. Professor Gross, we spoke a bit earlier about the process that led to the drafting of your expert report in this case. Did there come time that a decision was reached that your report should be supplemented?

A. I would not say that there was a decision. When, at a certain point in time, there was another complaint that was filed, in that context I was asked if I would consider taking the issues in my first report and was asked whether I would be in a position to move them forward in time.

Q. Is it the filing of the new complaint that triggered the decision to prepare a supplemental report or was it Judge Weinstein's April 3 order, addressing summary judgment issues in this case?

A. That led me to do it? Is that the question?

Q. Yes.

A. Well, I was asked, in light of the revised complaint, and I was also advised that Judge Weinstein

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had issued an opinion, and I did ask to read it.

I was then asked if the issues in my first report, whether I was willing to write a supplemental report that took those issues from the point in time at which my first report ended and addressed in a continuum how those issues extended up through a longer period of time.

And I was asked if I would do that and I indicated that I would.

THE WITNESS: Is it all right if I get a little coffee.

MR. FINK: Off the record.

THE VIDEOGRAPHER: We are off the video record at 1:42 p.m.

(Recess.)

THE VIDEOGRAPHER: One second. We are back on the video record at 1:44 p.m.

Q. All right. Professor Gross, before that brief break, we were discussing the events that led to the preparation of your supplemental report. Was there any explanation given to you as to why events in this litigation made the filing or the preparation of a supplemental report appropriate or necessary?

A. I think what it is fair to say is that, based

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on what I saw, the complaint kept evolving and Judge Weinstein, at various junctures, responded and there was a sense that, as that happened, the initial report that I did was largely, but not exclusively, focused on a time period and that, because of the way the case had evolved, that time period that I had described stopped and it would have been useful and helpful if I was able to extend that time period, as to which I spoke forward in time.

Q. Was it ever?

A. That's what I did.

Q. Sorry to interrupt. Was it ever communicated to you that your original report was no longer relevant to this litigation, in light of Judge Weinstein's April 3 summary judgment rulings?

A. Absolutely not. If anything, what we stressed was the importance of the report and of the continuum that I could develop from the very beginning, because it is the same story. It is just a story that extended longer; it is not a different story. And, indeed, one of the points of my second report is that it builds off, is integrally related to and is in a sequence with the first report.

So, no, the first report was not rendered

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lacking in utility by any means.
Q. Who drafted your supplemental report?
A. Nobody drafted it. I wrote it.
Q. Did you write that supplemental report in consultation with counsel about its contents or how did that happen?
A. I wrote the supplemental report in very much the same way that I wrote the first report. I asked a lot of questions about things that I wanted to see, documents that I wanted to see. I was asked questions and I speak with a very independent voice and my own voice, and that second report, as with the first, reflects that.
Q. Have you formulated any opinions in connection with this case that are not reflected in either your original or supplemental report?
MR. MUNSON: Objection to the question, foundation grounds. I am not clear what sort of opinions on what you are talking about.
MR. FINK: Any opinions.
MR. MUNSON: Was there any limitation, spins on anything?
MR. FINK: Let me get the answer to the question, as phrased, and if necessary --

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MR. MUNSON: If you can answer.
THE WITNESS: Actually, I was going to raise much the same thing. I was asked to render my opinion on various questions; and, to answer those questions, there are lots of other opinions and judgments that are embedded in these two reports. As an academic, as a thoughtful person about the bankruptcy system, I formed various opinions of people and the legal system, but I have not been asked to render my expert opinion as to those.
But as any person does, when you do things, it makes you think of other things and form views of other people and other situations. But I was asked to be an expert as to the issues that appear in these two documents and those are the ones as to which I am speaking.
Q. Are your views on all of the issues, as to which you were asked to form an expert opinion in this case, reflected in one or both of your reports?
A. As to those issues what I have been asked to speak about, what I have to say about them is here. Let me just add one thing to that, if I could, which is: As time progresses, there are things that were not in my hands at the time that I wrote either or both;

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and so, as I asked for additional things and get additional things, I become more informed than I even was before.
And, as that happens, I necessarily enrich that which I have written here, by what's given to me on a go forward basis. So, in that sense, as my reports indicate, I may, and indeed from now forward may continue to review such additional things, as may come forward.
And to the extent those augment what I have to say here, it is possible that that would happen. So, I want to be clear that that is a possibility. So, these contain my views as of the point in time that I wrote them, with the understanding that my work is ongoing, that it doesn't stop at a certain point, and continues.
Q. In that vein, have you reviewed any additional materials not reflected in the list of documents and your reports, since you completed your supplemental report?
A. If memory serves, and I have looked at a lot of documents and so their timing for me is an issue in terms of whether I read them before the second report or subsequent to.

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I think some of the expert reports may have come into my hands after this second report was completed. And, to the extent that I have looked at them subsequent to this, they would not be reflected yet anywhere in writing. But they would be things that I have thought about subsequent to the date that this is dated, the date that the second, that the supplemental report is dated, which is May 5th.
Q. Have you been asked to form any expert opinions in this case since May 5th, when you issued your supplemental report?
A. I have only been asked to address the issues that are contained in the two reports, and the issues that I have thought about since then all relate to the material that is contained in these documents, in terms of the types of questions that I have been asked.
Q. That answers my question.
Do you, as you sit here today, have any expectation that there will be any need for you to further supplement or amend either your original report or your supplemental report?
MR. MUNSON: Objection. Calls for speculation.
A. I was going to answer the same, I don't

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know. I don't think I could conjecture.
Q. In addition to the preparation of your expert reports in this case, have you been asked to consult with defendants on any issues that are not reflected in the reports?
A. No.
Q. Is there anything in either of your reports that you believe to be inaccurate, as you sit here today?
A. No.
Q. Am I correct in understanding that you billed $450 for your hour time and $600 for your time when you are testifying?
A. $450 for my time is correct. And $600 in respect of testimony, whether it is at trial or in depositions; that is correct.
Q. Do you know how much, what's the total amount that you billed so far in this case?
A. No. I don't, actually. I mean, I could, if you gave me a few minutes to go back over my records, I could make that assessment, but I don't know it off the top of my head.
Q. Do you have an approximate sense of how many hours you spent on the case so far?

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A. I am not trying to be evasive.
I just haven't, I don't keep track in that way. I bill monthly. The bills leave and I don't keep track in that sense. I think it is fair to say that it is not a full-time job for me. I am a full-time academic and I speak and write and lecture around the country, which occupies a fair amount of my time. So, it is something that I, it is not my exclusive employment.
Q. Do you know whether the magnitude of your total billings to date have been in thousands of dollars or tens of thousands of dollars?
A. They have been in the thousands of dollars.
Q. Who do you send your bills to?
A. My bills are sent to Ted Friedman at Kirkland & Ellis.
Q. Professor, I will ask you to focus your attention at this time on your original expert report, which has been marked as Exhibit 1 for purposes of the deposition.
Do you have that in front of you?
A. (Indicating).
Q. Please just answer yes or no.
A. Yes. I do have it.

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Q. Professor, if you will turn to page 4 of your report.
The first paragraph on that page, and page 4 begins the section of your report addressing the purposes of Chapter 11 for business debtors. Is that right?
A. That's the overarching question that is being answered in that question, with lots of sub-issues being addressed in that context.
Q. The second sentence of this paragraph says, "These two purposes are exemplified and can best be understood by looking at the structure of Chapter 11, including the key steps in the Chapter 11 process and identifying the principal participants, the main players in that process"; is that right?
A. Yes. That's what it says.
Q. Am I correct in understanding that in all Chapter 11 cases there are many different participants?
A. All Chapter 11 cases have certain participants that are there for all of the Chapter 11 cases, and some cases have added ones on top of those.
Q. Is it fair to say that the Chapter 11 process is designed to encourage negotiation to resolve the debtors' difficulties in satisfying the claims of its

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creditors?
A. Can you read me that again.
(Record read.)
A. I don't think I would articulate the function and purpose of Chapter 11 quite that way. Negotiation most assuredly happens, but a Chapter 11 is a statutorily created way for a debtor to get a breathing space in order to restructure its business and to repay creditors, in a fair and equitable fashion, that which the debtor legitimately owes them.
And in the context of that statute, the statute, at various junctures, gives people a vehicle where they can resolve their differences.
But Chapter 11 is a process that can involve litigation, that commonly does involve litigation, and it very much depends on a particular case and the particular facts, as to whether and how much negotiation there is, versus how much litigation there is.
Q. Are you familiar with the notion of a consensual plan of reorganization, as opposed to a non-consensual plan?
A. I am familiar, yes, with the terminology consensual versus non-consensual.

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Q. Would you agree with me that Chapter 11 is designed, in part, to encourage consensual plans of reorganization?

A. I would not say it is designed to achieve consensual plans, because there is actually a whole mechanism in Chapter 11 allowing creditors to vote on plans.

I think the hope is that there will be a consensual plan, but I don't think that Chapter 11 relies on there being a consensual plan. Indeed, lots of the provisions in Chapter 11 are specifically designed to deal with what happens when there is not a consensual plan.

Q. This paragraph goes on to make reference to the fact that you have prepared some charts with respect to the Chapter 11 process; is that correct?

A. Yes, I have.

Q. I will ask you to turn back to those charts. Specifically, I am going to ask you to first look at what's marked as appendix D and probably the easiest way to get there -- are you with me at appendix D?

A. Are we on the one that says "major players in Chapter 11 cases"?

Q. Yes, we are.

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This chart reflects, does it not, in your view, who the major players or constituencies are in Chapter 11 cases, as the general matter?

A. Yes. It is trying to diametrically show who are the major participants in Chapter 11 cases.

Q. If you turn with me, then, to the next chart, which is appendix E.

A. All right.

Q. This charts reflects, as you have entitled it, the major players in mass tort Chapter 11 cases; is that correct?

A. Yes, it does.

Q. Am I correct in understanding that what this chart does is it adds some additional constituencies to reflect some of the complexities, I suppose, of mass tort reorganizations?

A. I would say what it is trying to do is it is trying to take chart D, which is the general chart, and it is trying to make it specific, as to Chapter 11 mass tort cases.

Q. It does that by adding two additional creditors committees to what's reflected in the appendix D; right?

A. Actually it does several things. The first thing it does is it adds a future claims representative, which is the one in the lower left-hand part, and that is added because in non-mass tort cases the issue of future claims doesn't arise.

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In mass tort cases courts have commonly seen the need for someone to speak to people who aren't otherwise represented, which is very similar to what I did in the Integrated Resources Chapter 11 case, which is speak to parties who otherwise aren't represented.

The other thing that it does is, in the box related to creditors committees, it enumerates the particular kinds of committees that can be in existence in a mass tort case.

And, in particular, it adds two committees; namely, personal injury claimants and codefendants as separate committees, because one committee normally is not composed of people whose interests are not consonant or similar with the other.

And in this situation the interests of these two added boxes aren't necessarily the same as those that are in the first box.

Q. Okay. Would you turn with me, if you would, to appendix F, which is your chart of the key players in the Johns-Manville Chapter 11 case.

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Am I correct that what appendix F does is it takes the chart in appendix E and then, aside from making clear that it is Johns-Manville that we are talking about, as opposed to a generic debtor, it drops a number of the constituencies reflected in appendix E at the top of the chart?

A. What it does is it reflects my interpretation and analysis of how the Johns-Manville case actually worked and then, applying chart E, asks who of those players in chart E had a major role, a key role in this case, in this context.

And so, what I am doing is trying to hone in or zero in, based on my interpretation and analysis and assessment of the facts here, which players I think played a central role.

Q. In the Manville bankruptcy were there more or more than one class of Manville's codefendants? When I say "classes," I am referring to classes of creditors.

A. I would have to go back and look at the actual plan, as to whether the codefendants, the insurance company codefendants were in a different, were somehow subdivided.

There was a separate class for property, personal injury versus personal injury, those were in

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separate classes, but without looking at the plan itself, I would not want to speculate as to whether the codefendants were created in separate classes. I don't know the answer to that.

Q. Isn't it your view that the committee of codefendants was one of the key players in the Manville bankruptcy?

A. Actually, if you look at chart F, in this particular case, while the codefendants certainly participated in the case, it is my view that the key players here based on chart F of the creditors committees that the key committee, that had the most active and interactive role were the plaintiffs' lawyers for the personal injury claimants.

Q. If you turn to page 13 of your report with me, you see the full paragraph that starts with "in formulating its plan."

A. Yes.

Q. If you go one, two, three, four, the fifth line down, you see it says: "In particular, in addition to the company itself, the key players were the Committee of Asbestos Health Claimants (representing all personal injury claimants other than future claimants), the Future Claims Representative and

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the Committee of Codefendants"; is that right?

A. Yes. That's what it says.

Q. Have you changed your opinion as to whether or not the codefendants were a key player in the Manville bankruptcy?

A. If I could, could I just read the context of this paragraph, because I think --

Q. You certainly may.

A. All right.

I have not changed my view at all. I think that while the same term, "key player," shows up here, as well as in appendix F, what I would tell you is that the reference to codefendants here on page 13 is dealing with the formulation of the plan and negotiating its acceptability to creditors and equity holders, which is at a very early phase in the Chapter 11 case.

And I would say that, over the passage of time, the role of the committee of codefendants diminished. It certainly, in the paragraph to which it is referenced, which is in time plan formulation and negotiation, they were key. But as the case progressed and moved through time, I would say that the role of the committee of codefendants diminished.

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Q. Going back and comparing appendix E and appendix F, again, if we can. Appendix E reflects the major players in the mass tort Chapter 11 cases. It includes unsecured trade creditors under creditors committees; is that right?

A. Yes.

Q. Was there an unsecured trade creditors committee in the Manville bankruptcy?

A. If my memory serves, and I would want to review the list of the committees that appears in the disclosure statement, there was a class of trade creditors articulated in the plan. But I wouldn't want to speculate without looking at the exact reference in the disclosure statement, as to whether there was or was not a particular committee of trade creditors.

Q. You don't know whether or not there was a committee of unsecured trade creditors in the Manville bankruptcy?

A. I would not answer, one way or the other. I would want to check the disclosure statement, before I answer that question.

Q. Appendix E also reflects, under "creditors committees," that insurance companies can be an important constituency in mass tort Chapter 11 cases;

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right?

A. Yes.

Q. Were there codefendant insurance companies involved in the Manville bankruptcy proceeding?

A. Yes.

Q. Was there a committee of co-defendant insurance companies in the Manville bankruptcy proceeding?

A. There was a committee of codefendants and I would want to look at the exact list as to which exact entity sat on that committee.

Q. Do you have an understanding as to whether there were codefendants other than insurance companies involved in the Manville bankruptcy?

A. I am sorry, am I --

Q. My question is whether you know whether or not there were Manville codefendants involved in the Manville bankruptcy, other than insurance companies?

A. As I sit here now, I believe the answer is yes, there were other codefendants, other than insurance companies.

Q. Do you know who they were?

A. I would not be able to recollect their name without the names of the particular entities that sat

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on that committee. But there were entities that were also being sued, and some of the issues surrounded what proportion of liability Johns-Manville had for certain types of asbestos injury, versus others who also produced asbestos. And so, that was another group that cared very much, initially, about how they would be treated.

Q. Turn back with me, if you would, to page 4 of your report.

A. Yes.

Q. If you look at footnote 2, it reflects that you, among other scholars, have the view that Chapter 11 should serve to protect community interests; is that right?

A. Yes.

Q. Who would be the relevant community, with respect to the Manville Chapter 11 proceeding?

A. The notion of community, which is a notion that is articulated in my book, Failure and Forgiveness, talks about a potentially wide range of communities that have an interest in what happens in a particular bankruptcy case. And within the book I narrow the range of potential communities to those who have had an injury that is redressable, a curable,

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fixed through the bankruptcy.

So, there are a number of potential communities that one could think about in the Johns-Manville case, should they be able to prove that they had an injury that could be remedied through the bankruptcy.

Q. Are the members of the tobacco industry members of that community, in your view?

A. I would say no. The tobacco industry is not a community within the sense that I am using the term "community," because of the way in which I narrow the definition of community within the book.

One of the things that I talk about is that any event has a ripple effect, but at some point you have to limit the ripple.

And the way that that is limited here would be that the communities, the kinds of communities that would have a redressable interest because of the Manville bankruptcy would not be the tobacco industry.

Q. The videographer has indicated to me that we are close to the end of the tape. This might be a good time to take a very brief break, if we can keep it brief.

THE VIDEOGRAPHER: We are off the video

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record at 2:17 p.m.

(Recess.)

THE VIDEOGRAPHER: We are back on video record at 2:22 p.m.

Q. Professor, you have been critical, have you not, of the notion that all creditors of a like kind should be treated similarly.

A. I think you need to distinguish between, in your question between what I believe the law currently is and how the law currently is applied and should be applied, versus if I had the opportunity to make suggestions for improving the bankruptcy system, how I might improve it.

And in the former context I am very clear about the Bankruptcy Law providing equality and fair treatment for all creditors, and in the Manville bankruptcy that meant past, present and future claimants.

And in my book I addressed the fact that I think that there should be certain situations in which if the law were changed, I would like to see certain types of creditors being allowed to be treated differently than others.

Q. Okay.

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Given that background, you have refuted the concept that all creditors of a like kind should be treated similarly; right?

A. No. I don't think that is true at all.

I think I believe that the law as it is, with some very minor statutorily created and judicially created exceptions, except for those; it is my belief that the law as drafted now, the current Bankruptcy Code, says that like creditors should be treated alike.

Q. Do you agree with the statement that equality of treatment fails to recognize the marked diversity among creditors?

A. In my book one of the things that I point out is that the Bankruptcy Code as it is drafted operates off of an one definition of the term equality, and equality is an immensely rich and very complicated notion, and that while current law treats equality as pro rata, equal distribution among creditors who are similar, there are other ways of thinking about equality that are more nuanced, more subtle, different.

One of the things that my book tries to do is to recognize that we have the law as it is, and that is

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the law that is applied, and that is the law as it should be applied now.

But ask people to think that if we could change the law, how might we think about that, and who is it that we might want to protect, and that difference between recognizing what the law is and recognizing and thinking about what the law could be is in large part about what an academic does in terms of integrating theory and practice.

Q. Professor Gross, if you turn with me to page 7 of your expert report.

A. Yes.

Q. And would you turn to the last paragraph on that page which begins with, the development of the plan is not the end of the process.

Do you see that?

A. Aha.

Q. Am I correct --

A. Yes, I do.

Q. Thank you.

Am I correct in understanding that this paragraph and the following paragraphs describe in general terms the bankruptcy process from the time of plan negotiation forward?

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A. If it is all right, may I look at the paragraph to which you are referring?

Q. Please do.

A. Actually, this paragraph doesn't describe all that you asked about in the question.

It describes one developmental block in a long continuum of issues. And what this is saying is that after the plan is created, that is not the end of the day, it is not like an agreement that people reach outside of bankruptcy where you reach the agreement and you sign on the dotted line. The bankruptcy is different, it has its own set of rules, its own way of speaking, its own approach, and what this paragraph is dealing with is, within the context of the bankruptcy laws, what is it that happens to a plan once it has been created.

Q. Okay.

And this paragraph goes on to say that one of the requirements before a plan can be confirmed is that the plan be feasible; is that right?

A. Yes.

Q. Do you know whether bankruptcy Judge Lifland found that the Johns-Manville plan of reorganization was feasible?

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A. To confirm the plan, which he did, he had to have found that it was in his judgment feasible.

Q. Have you reviewed the confirmation order that Judge Lifland entered in the Manville bankruptcy case?

A. I have, and I would want to check my list of documents here, I believe that I have seen that confirmation order but I would want to look over the list of documents to make sure that that is true.

Q. Okay.

This paragraph goes on to say that another requirement before a plan can be confirmed is that creditors receive at least as much as they would receive in a Chapter 7 liquidation case; correct?

A. Yes. That is what it says.

Q. All right.

Do you know whether a liquidation analysis was performed with respect to the Johns-Manville bankruptcy case?

A. What I can tell you is that the plan would not have been confirmed had there not been such an analysis.

In other words, one has to do that analysis in order for there to have been confirmation of the plan.

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So, these two requirements, I know the plan was confirmed, which means that these two issues had to have been addressed.

Q. Did you go back and do any sort of independent review of the proceedings that led to the feasibility determination or any proceedings relating to the liquidation analysis?

A. Let me tell you what I did do.

In the course of my analysis, I became aware that there was information that was known to various parties that indicated that the trust was financially doomed and that it could not operate as people had anticipated.

Now, that information that I have came into being based on what I saw after confirmation but before consummation, which is the date at which the plan becomes final.

Q. But my question is, whether, part of my question is whether you reviewed the record of the proceedings that led to the Bankruptcy Court's feasibility determination?

A. I did not second guess Judge Lifland's decision to confirm this, the Johns-Manville Chapter 11 case.

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Q. Okay. But that is not my question.
The question is whether you reviewed the record of the proceedings that led to Judge Lifland's feasibility determination?
A. What I indicated to you before, and I want to go back. I may well have read his confirmation order itself, I did not go back and review or revisit either the feasibility assessment or the liquidation analysis, other than to know that they had to have been conducted and they had to have satisfied Judge Lifland for there to have been confirmation.
Q. Okay.
This paragraph goes on to set out the requirement, and it says the Bankruptcy Code requires that a plan must be described in a document known as a disclosure statement; right?
A. Yes, that's what it says.
Q. Was there a disclosure statement with respect to the Johns-Manville plan?
A. Yes, there was.
Q. And the last --
I am sorry.
Go ahead.
A. Let me -- I have been given one that is

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labeled first amended, I believe, disclosure statement.
Q. Do you know whether or not that is indeed the disclosure statement with respect to the plan that was ultimately confirmed?
A. I understand it to be the disclosure statement that is considered for these purposes of this paragraph to be the disclosure statement.
Q. The last sentence of this paragraph says, the disclosure statement must be approved by the court following a hearing; right?
A. Yes. It indicates here that there has to be a hearing on the disclosure statement.
Q. Was there such a hearing conducted with respect to the Johns-Manville disclosure statement?
A. To the best of my knowledge, yes.
Q. Was that disclosure statement ultimately approved by Judge Lifland?
A. It had to have been approved, otherwise creditors couldn't have voted on the plan and the plan could never have been confirmed.
That's a prerequisite in a sense to plan confirmation, which antedates plan, which goes before, which has to happen before plan consummation.

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Q. So a vote by the creditors on the plan is a prerequisite to confirmation; is that right?
A. As this same paragraph indicates here, creditors are entitled to vote and you can't confirm a plan if there are impaired creditors unless there is at least one consenting class. So that is the specific rule.
Q. Okay.
And did the creditors in the Johns-Manville bankruptcy vote on the Johns-Manville plan?
A. I can only assume that they did.
I have never actually seen the votes themselves, but for there to have been confirmation, they have to have voted.
Q. I am now looking at the second paragraph on page eight.
After the vote, the next step in the process is for the court to hold a hearing on the plan to ensure that it complies with the requirements of the Bankruptcy Code. This hearing is known as the confirmation hearing; right?
I am just asking you --
A. Actually, the lead in first phrase, you articulated it differently than what I wrote.

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But if creditors approve vote in favor, then you go to the next step.
Q. Which is a confirmation hearing; is that right?
A. Yes.
Q. Did Judge Lifland hold a confirmation hearing with respect to the Manville plan?
A. To the best of my knowledge, absolutely he held a confirmation hearing.
Q. Do you know whether --
Well, actually, your next sentence in this paragraph says, prior to that hearing, parties are entitled to file objections to the plan; right.
A. Yes. That is the next sentence.
Q. Do you know whether any parties filed objections to the Manville plan?
A. I believe there were objections that were filed to the Manville plan.
Q. The next sentence says, the confirmation hearing can be protracted and testimony is often presented to demonstrate whether the plan should or should not be approved; right?
A. That is correct.
Q. Do you know whether or not the Johns-Manville

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confirmation hearing was protracted?
A. Um, based on my understanding there was a hearing, but I would not want to speculate as to whether it was or was not protracted here, without looking more closely at the actual hearing transcript.
Q. Do you know whether any testimony was given at the confirmation hearing about whether or not the plan should be approved?
A. I have not looked at that transcript, at least not that I can recollect, to know what testimony was or wasn't given.
But based on my 20 some years of experience, I would assume that there was testimony that was proffered.
Q. The last sentence of this paragraph says, if the court determines that the plan satisfies the legal requirements of the Bankruptcy Code and should be approved, it then enters an order known as a confirmation order; right?
A. Yes. That is exactly what it says.
Q. And, indeed, Judge Lifland entered a confirmation order with respect to the Manville plan, did he not?
A. Yes, he did.

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Q. Professor Gross, if you turn to page 9 of your report.
The last sentence of the first full paragraph talks about the appointment of future claims representatives in mass tort Chapter 11 cases; does it not?
A. It talks about that there may be the need for a spokesperson for future claims.
Q. Is there any Bankruptcy Code provision relevant to the appointment of a futures representative in asbestos bankruptcies?
A. I think that in appointing a future claims representative, most courts look to Section 105 of the Bankruptcy Code which is a section that gives the court power to do what is necessary to carry out the terms of the Bankruptcy Code.
I don't know of any particular explicit provision that uses the word future claims representative within the Bankruptcy Code.
Indeed, had there been one, there wouldn't be all this debate about what is and isn't a claim, but there is leeway within the code to enable the court to make such an appointment.
Q. The next sentence of your report, which

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begins a new paragraph says, the purpose of the Chapter 11 cannot be successfully achieved if the debtor is working in isolation. The debtor in possession needs to work hand in hand with the creditors committees and equity holders committee and in a mass tort case with the future claims representative.
Did I read that correctly?
A. Yes, you did.
Q. Am I correct in understanding that in a mass tort Chapter 11 case, that it is normal procedure for various constituencies to work together towards the resolution of the case?
A. I would say that in all Chapter 11 cases there is a much greater likelihood of success if the debtor can work together with the various constituencies whose interests are impacted by the bankruptcy.
Q. Would you describe that as a consensus building process?
A. Some people might term it consensus building.
I would say it is a negotiated process, a navigated process where parties with differing interests try to assess how a limited pool of assets

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will be divided up.
Q. These parties, some of them may have conflicting interests; isn't that right?
A. They can have some interests that are conflicting and some that are consonant; and one party can have both.
Q. Despite the fact that there may be some conflicting interests, the purposes of Chapter 11 can most successfully be achieved if these various constituencies work together; is that right?
A. I am sorry. Can you just read the lead in again or repeat the lead in to the question one more time. I am sorry.
Q. The question was just, despite the fact that some of these constituencies may indeed have conflicting interests, the purpose of Chapter 11 can nonetheless be successfully achieved if they work together to resolve the case; isn't that right?
A. I want to clarify one thing before I can answer that question.
There is a tension in a Chapter 11 case and a certain kind of conflict in terms of who's representing whose interest and for what purpose.
And at the lead in to your question I want

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to be very clear in answering it to point out that various of the parties have very complicated issues and constituencies that they are trying to protect and further.

That process, navigating that process means that you make certain choices, you give up certain things and you get certain things.

And you are making assessments all along the way about what you are willing to give up in order to get certain other things and you are balancing a very complicated group of issues as to what you are trying to achieve. And that process is one that may ultimately lead to a successful Chapter 11, but not necessarily.

And what's important from your perspective in asking it when you ask me is it consensus building, I would tell you that it is the way to get a Chapter 11 case confirmed.

It is not a way of guaranteeing success of that Chapter 11 or that all parties are necessarily happy with the results.

Q. Professor, let's turn to page 10 of your report.

I see a heading on that page heading

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4, second opinion. Were the Johns-Manville Chapter 11 plan of reorganization and the trust established thereunder created in a way that allowed Johns-Manville, through its reorganization, to achieve in actual practice the purposes of Chapter 11.

Did I read that heading correctly?

A. Yes. You most assuredly did.

Q. Is the discussion that you have in this section directed towards the question whether the trust was created in a way that could permit for the purposes of Chapter 11 to be fulfilled or whether in your view the purposes of Chapter 11 were in fact fulfilled by the trust as events occurred over time?

A. I am sorry. Can you repeat it.

I am not trying to be difficult. But the first part of that question to contrast it to the second part.

Can you just --

Q. That's what I am trying to understand, is whether the section, in fact, addresses whether the trust was created in a way that would permit the fulfillment of the purposes of Chapter 11 or whether in fact what your opinion addresses is looking backward in time at what actually happened whether in your view

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those purposes were fulfilled?

A. In this section, which goes for several pages, indeed all the way up to page 19, there are a lot of subtleties that are not addressed, that go to both pieces of your question, namely whether in the abstract a trust is a potential way of dealing with the issues, and then was this trust in this instance with its specific features given the way it was created with its structure, did it actually enable this debtor to fulfill the purposes.

I answer both, and there are different questions, and there are sub-issues that have to be addressed to get to answer both of those.

Q. In your view, is a trust a potential way -- or was a trust a potential way to resolve the problems that were facing Manville?

MR. MUNSON: Objection to the form. I don't understand the question. I don't know what you are saying, if you are saying was this trust a potential way or was a trust?

Q. The question is a trust, but I will rephrase the question. That is a fair objection.

I guess, trying to put it in the terms in your heading, my question is whether a trust was a

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potential way to allow Johns-Manville through its reorganization to achieve the purposes of Chapter 11.

MR. MUNSON: Just so I am sure I understand the question, when you say a trust, do you mean any conceivable trust?

MR. FINK: Yes.

A. I want to answer your question. But before I do that, this heading addresses this particular trust, namely the trust that was created through a variety of negotiations, and where its contours were negotiated versus the overall concept of a trust.

So this is going to the, this sentence, the initial lead in sentence is going to the specific Johns-Manville trust.

As to your question, could a trust, any trust potentially be a vehicle for solving, as a way of handling mass tort claims, I think the answer is you would have to have a very carefully structured trust.

You would have to have a trust that was different in content, in operation, and in independence than the trust that was created here.

But in concept could some trust have worked in a mass tort case, yes. But this trust in this case was doomed to fail, it couldn't work, it was badly

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structured, badly organized in terms of its management structure and badly operated.

Q. Would you agree that it would be a challenging task to form a trust that would successfully resolve the claims against the mass tort debtor?

A. Yes. I think it would be challenging, not impossible, but challenging.

Q. There are a number of difficulties in that process?

A. In setting up such a trust there are lots of things that one would want and need to pay attention to. And they would be difficult because what might make the trust successful might not be pleasing to some other parties in the case.

And so, one would have to navigate carefully and thoughtfully through how to achieve them.

Q. In your view, has there ever been a successful mass tort trust?

A. I have not been asked to look at whether there exists such an entity. And I would, without studying other cases and the depth with which I have studied this one, I would not want to speculate as to whether such a one exists to my satisfaction.

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Q. Are you aware of the A.H. Robins trust?

A. As someone who remains very current with what's happening in the world of bankruptcy, I am familiar in a general sense with the A.H. Robins case, but I have not studied and analyzed that case either in terms of its long-term or short-term success.

Q. When you say that the trust is badly structured, badly organized and has been badly operated, what do you base those opinions on?

A. Well, one of the things that I did in making both my first report and my supplemental report is that I looked at a wide range of documents relating to the trust, its operation, its function, and read a great deal of information which is contained in both reports as well as in judicial opinions and in articles about how that trust functioned.

And all of that material has informed my understanding as well as certain depositions about how this trust both was structured from the get go in terms of its finances, and in terms of its actual structural functioning to who managed it and how they were picked and how they did their jobs to how that trust then operated on a go forward basis in terms of settling and paying claims.

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And in that context I am familiar with where it started, where it went, and where it is now in terms of now paying claimants only 10 percent of their allowed claim.

That, all of that has led me to my belief that there were errors from the very, very beginning.

Q. Are there any Bankruptcy Code provisions that address how a mass tort trust should be structured, organized or operated?

A. There are.

In a sense because the Bankruptcy Law requires that all like creditors be treated fairly and equitably, and one of the things that happened when this trust was created is that Johns-Manville bifurcated itself and it parked its assets in one place and it moved its liabilities over to the trust.

And when it did that, when it put its liabilities over there, the Bankruptcy Code provisions extended over to how that trust had to operate, because that trust was not a separate independent autonomous entity in the sense that it could operate itself any old which way.

It had to operate based on bankruptcy principles because it was a, the heart really of what

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enabled that plan, the Johns-Manville plan to be confirmed.

And so, the Bankruptcy Code provisions, in essence, rode with that trust and one could say that those Bankruptcy Code provisions inform and govern how that trust has to operate.

Q. I understand your testimony to be that in some fashion, some Bankruptcy Code provisions inform or govern mass tort trusts created in bankruptcy.

But my question is whether there are any Bankruptcy Code provisions that actually talk about how a mass tort trust should be structured, organized or operated?

Please point me towards the specific ones that you are talking about, if you think that there are.

A. I think, to answer your question, I have to explain to you a little bit how bankruptcy operates.

The Bankruptcy Code itself is regularly and consistently augmented by other bodies of law that intersect.

A bankruptcy doesn't happen in a legal vacuum. When you have a Bankruptcy Code, it's giving you the rules for the bankruptcy itself, and then what

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happens is other rules, state and federal, fold into that, and in essence help bring that reorganized company from its state as a debtor into its state as an emerged entity.

So, I think it is fair to say that the Bankruptcy Code itself, not a specific section of it, but its whole operation is augmented by a very rich and fulsome body of law external to bankruptcy that informs it, that augments it, that gives it life, and so, in answer to your question it is not a code section, it is the code.

Q. Am I correct in understanding your testimony that you are unable to identify any provision of the Bankruptcy Code that talks about how a mass tort trust should be structured, organized or operated?

A. It is my testimony that there is no one section that tells you how to do it.

But it is my testimony that as an expert in bankruptcy, all bankruptcy law is informed by, augmented by and enriched by federal and state law that exists external to the Bankruptcy Code.

That code can't operate in isolation, it needs other laws to make it go.

Q. Am I correct in understanding that none of

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your writings address the question of how a mass tort trust should be structured, organized or operated?

A. My writings go to how the bankruptcy law should operate. And in that context my writings are cognizant of the role that non-bankruptcy law plays in making the system work.

And in that sense I have had lots of time and experience to think about how one makes that Bankruptcy Code work, what bodies of law do you need in a given case to take into account.

That said, I have not personally set up a personal injury trust like the Johns-Manville one, but there haven't been many people who have.

Q. Let me ask you again. Am I correct in understanding that none of your writings expressly address the question of how a mass tort trust should be structured, organized or operated?

A. Actually, I have to say that that is not true because at the level at which I write, while it may not speak specifically by name to a mass tort trust, it is speaking to how the system has to operate and what its underlying principles are.

And so, I would tell you that in truth I do write about that, I just haven't isolated my writing to

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speak only about mass torts. I speak about the system and Chapter 11 and bankruptcy.

And in that sense I am speaking about a wide variety of cases which would include a mass tort case.

Q. Would you look with me at page 11 of your report, please.

I am looking at the sentence that begins in the beginning of the line, sorry, the middle of the line on the 7th line down, the Johns-Manville approach.

A. I am sorry. The first --

Q. The first paragraph.

A. Full paragraph.

Q. The carryover paragraph. Sorry. The 7th line down, the Johns-Manville approach.

The Johns-Manville approach to the tobacco companies in the personal injury litigation context became known at the time as the empty chair defense.

Do you see that?

A. Yes, I do.

Q. What's the basis for this statement?

A. In the documents that are appended to this report, I read a variety of documents that addressed how Johns-Manville was approaching its ever increasing

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litigation and the lawsuits that were being brought against it for all of the people who were injured from asbestos.

In the context of reading these various documents, the empty chair defense was explicitly mentioned and discussed and debated.

Q. Outside of the documents that you reviewed in connection with preparing your expert reports in this case, do you have any other basis for making the statement that the Johns-Manville approach to the tobacco companies and personal injury litigation context became known at the time as the empty chair defense?

A. Well, I have read, in the material that is cited here I have read both articles and references to the empty chair defense.

Q. Right.

I am just asking whether aside from the materials that you reviewed in connection with your expert report in this case, is this something that you already knew or is this something that you already learned by reviewing those materials?

A. I would say that it is something that prior to this I had heard about but had not focused attention

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on.
Q. Have you performed any analysis of whether this, quote, unquote, empty chair defense was successful?
A. I was not asked to make that assessment as to whether that approach did or did not work successfully for Johns-Manville.
Q. So, am I correct in understanding that you have not performed any analysis of whether the, quote, unquote, empty chair defense was successful?
A. I am not sure in which sense you are using the word successful.
I think it is fair to say that I don't have a position as to whether or not that was or was not the right approach for Johns-Manville to take.
Q. Have you made any effort to quantify what amounts, if any, Manville avoided incurring as liabilities, by virtue of asserting this defense?
A. I was not asked to quantify and I have not quantified that.
Q. If you look with me at page 12 of your report, the second full paragraph that starts at the bottom of the page.
You see the sentence, it was in this context

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that a decision was made that future claimants be treated as parties in interest for purposes of the Johns-Manville Chapter 11 case.
Do you see that?
A. Yes, I do.
Q. Okay.
Who made that decision?
A. I am not sure that it was, and I would want to refresh my recollection, I am not sure that it was ultimately decided in some formalized way.
I think, at least as I recollect at the present moment, that seemed to be a way that the parties and the court believed things could be handled.
And as I sit here, I don't recollect, and I would want to look at the list of documents as to whether that ever was actually memorialized in some concrete opinion by Judge Lifland.
I don't know the answer to that.
On the next page of your report, page 13, at the last sentence of the carryover paragraph, you say that the determination to treat future claimants under the Johns-Manville plan of reorganization was unique when it was made.

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Do you see that?
A. Yes.
Q. That determination was only one of a number of unique features of the Johns-Manville plan at the time that it was entered into; is that right?
A. Well, there were many features of the Johns-Manville plan that were not unique and that were very typical of all Chapter 11 cases.
I think it is fair to say that the treatment of future claimants was unique and that this was, to the best of my memory, among the first, if not the first, asbestos company to seek to resolve its problems through the bankruptcy system.
Q. Was the Johns-Manville reorganization the first mass tort bankruptcy?
A. I think some people have referred to it that way.
It certainly is my view that based on my memory, it is the first asbestos manufacturer to seek bankruptcy relief, and it was certainly early in the group of mass tort cases, of which there haven't been an abundance, but I would say it is early in that group of cases.
Q. Can you identify any mass tort bankruptcies

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that predated the Manville bankruptcy?
A. I would want to think about whether there were some environmental kinds of cases that could have been classified as mass torts, because some people interpret mass torts to include environmental claims. And I don't remember the exact date of those early environmental cases that raised mass tort issues.
But, I think it is fair to say that this case was early in the growth of mass tort entities accessing the bankruptcy system.
Q. It is fair to say, as you sit here today, you are not able to identify any mass tort bankruptcies that predated the Johns-Manville bankruptcy; is that right?
A. I fully recognize that this case was very early in the development of mass tort entities accessing the bankruptcy system.
But I would not, without looking at all of the cases that exist in the universe, I would not want to say that there never had been one that did not have some of the features of a mass tort case.
Q. Okay.
The Johns-Manville bankruptcy, well, was the Johns-Manville bankruptcy the first mass tort

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bankruptcy to use a trust to resolve past, present and future claims against the debtor?

A. To the best of my knowledge, and I have not done an independent assessment of every bankruptcy case prior to 1982, but many people have referred to this as being the first example of the use of a trust. For purposes of mass torts, trusts have been used in other bankruptcy contexts, I am sure, for other purposes.

Q. You made reference earlier in your testimony to the use of something called a channelling injunction, in the Johns-Manville bankruptcy case; do you recall that?

A. I actually wasn't referring to it in the context of the Johns-Manville bankruptcy case, because the actual channelling injunction to which I was referring came into being after the Johns-Manville case was filed and finished.

There is such a thing as a channelling injunction, but its creation happened after Johns-Manville.

Q. Wasn't a channelling injunction entered as part of the confirmation order in the Johns-Manville bankruptcy case?

A. An injunction was entered --

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A channelling injunction is a term of art that bankruptcy people have come to use to refer to the specific statutory enactment that came into being later.

There was an injunction which was an effort to ensure that when Johns-Manville split itself in essence in half, and parked its assets with itself to become a successful company, and parked its liabilities in a different place, namely in the trust, that when it did that, there had to be a way to ensure that claimants couldn't go back against Johns-Manville itself.

Otherwise, if they could have then one of the major purposes of the bankruptcy, which was to allow Johns-Manville to succeed as an ongoing business, would not have been achieved.

Q. So the injunction entered in the Manville bankruptcy case directed claimants against the trust as opposed to going back and trying to sue Manville after it had reorganized; right?

A. I am sorry.

MR. FINK: You can read that back.

(Record read.)

MR. MUNSON: I will object because I don't

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think the question is clear.

Q. I will ask a different question.

Did the injunction entered as part of the Manville bankruptcy preclude prepetition tort claimants from suing Johns-Manville, the reorganized Manville for those prepetition claims after applying confirmation?

A. I would want to look at the exact wording of that injunction. But its purpose was to make sure that personal injury claimants looked to the trust for resolution of their claims, rather than looking to Johns-Manville.

Q. Okay.

And was the Manville reorganization the first reorganization to utilize such an injunction?

A. I would have to answer, no. The Bankruptcy Code contains an injunction, and a variety of plans over the years have had provisions about who can sue whom after a bankruptcy. So, in that sense the injunction was not a new feature.

What was new was the effort to strip Johns-Manville of its exposure for asbestos and to move that over to a separate entity.

That part was new. And that stripping down

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of Johns-Manville and the parking of that liability in the trust is the feature that for me is the new feature of this, of the Johns-Manville case.

Q. Is it fair to say that the Johns-Manville reorganization was the first mass tort bankruptcy case to utilize the trust plus injunction structure?

A. I think I indicated when you asked that question earlier in two separate parts that other injunctions have been used and other trusts have been used in bankruptcy cases before Johns-Manville.

And that for me what made this unique was this splitting, was the structure pursuant to which a business entity separated its assets and liabilities and parked the healthy part of the business in one place and parked its liabilities in another. That is the part that for me was unique.

Q. Okay.

I understand, and my question, I think it is amenable to a yes or no answer, is whether the Johns-Manville reorganization was the first mass tort bankruptcy case to use the trust plus injunction structure?

A. I can speculate.

I would, based on, without doing more work, I

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think it is fair to say that it, to my knowledge, is the one that used this split and parked the liabilities in a trust.

Using an injunction is a much more common feature of bankruptcy cases.

Q. Congress ultimately enacted a Bankruptcy Code provision that specifically approved of the trust plus injunction mechanism used in the Manville bankruptcy case; did it not?

A. Actually, I -- the legislation that was enacted happened after Manville, so I am not willing to say that it was the exact codification of the injunction that was used in Manville or the trust structure that was used in Manville.

So, what happened legislatively happened after the fact and was not intended to say that this trust as it was structured with its contours is now legislatively approved, nor was the actual injunction in the actual case now codified.

What the legislation did is something different.

It established after the Manville case was over that the concept of bifurcating assets from liabilities and then enabling parties to only look to a

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certain entity and not another entity was a viable approach under the Bankruptcy Law.

Q. What's the Bankruptcy Code provision to which you are referring?

A. It is in Section 524.

Q. Is that Section 524 G?

A. I believe it is. I don't have a code here.

MR. FINK: Let's mark this as Exhibit 3.

(Gross Exhibit 3, Section 524 of the Bankruptcy Code, U.S. Code Annotated, Title 11, Bankruptcy, Chapter 5, marked for identification as of this date.).

Q. Professor, do you have a copy of what has been marked as Exhibit 3 before you?

A. Yes, I do.

Q. Professor, I will represent to you that this is a computer printout of 11 USC Section 524, or Section 524 of the Bankruptcy Code.

Does reviewing this document assist you in answering whether Section 524 G is the section to which you have been making reference?

A. Yes. The specific subsection containing the channelling limit is Section 524 G.

Q. And this statute also makes Congress'

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ratification of that mechanism retroactive to preexisting trust plus injunction structures, does it not?

I can direct you to Section H.

My question is whether the statute ratifies existing injunction plus trust structures retroactively; does it not?

A. I have not been asked and I have not recently looked closely enough at the retroactivity section within Section 524 to speak to how this section applies retroactively.

Q. Wasn't that section, in fact, adopted for the express purpose of ratifying the Manville and UNR bankruptcies and the trust and injunction provisions adopted in those bankruptcies?

A. I don't want to speculate on that issue.

Q. You don't know, is that right?

A. I don't want to speculate. I would rather err on the side of being careful as opposed to the side of being wrong.

MR. FINK: Would you mark this as Exhibit 4, please.

(Gross Exhibit 4, bankruptcy amendments of 1994 dates of consideration and passage,

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Bankruptcy Reform Act of 1994, Bankruptcy Amendments of 1994, marked for identification as of this date.)

Q. Professor Gross, do you have before you what has been marked as Exhibit 4 for purposes of this deposition?

A. Yes.

Q. I will represent to you that Exhibit 4 is again a computer printout, this time it is a printout of House report number 103-835.

Can you tell me what a House report is?

A. House report 103-835 I assume would refer to some bill that was introduced into the House of Representatives, and it is --

Q. In fact, this document makes plain on the top of the page, does it not, that this is a document prepared for the House of Representatives of the United States Congress addressing the Bankruptcy Reform Act of 1994?

A. Well, actually the House report number which is 103-835 is different than the public law number, which is 103-394.

But the caption here is referring to a variety of reports, the Senate report and the House

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report, that this little subheading here, the one further down seems to be that portion which is the House report.

Q. The House report --

A. As opposed to the Senate report.

Q. Sorry to interrupt.

So it is the report of the House of Representatives with respect to the Bankruptcy Reform Act of 1994; right?

A. It seems to be.

Q. Would you turn with me to page 54 of the printout.

You see that there is a heading Section 111 bankruptcy court injunctions.

Please answer aloud.

A. Yes. I see Section 111.

Q. Okay.

That section begins by saying, this section adds a new Subsection G to Section 524 of the code establishing a procedure for dealing in a Chapter 11 reorganization proceeding with future personal injury claims against the debtor based on exposure to asbestos containing products.

The procedure involves the establishment

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of a trust to pay the future claims coupled with an injunction to prevent future claimants from suing the debtor.

And the next paragraph says, the procedure is modeled on the trust injunction in the Johns-Manville case, which pioneered the approach a decade ago in response to the flood of asbestos lawsuits it was facing.

Do you see that?

A. Yes.

Q. This House reports that Congress was attempting to codify the trust and injunction mechanism used in the Manville bankruptcy case; does it not?

A. It actually doesn't say codify.

It says it is modeled on it, and I have to say that I am very careful when I read House reports in bankruptcy, House reports generally.

But one has to know the particular timing of the language in the legislation versus the language in the House report, because sometimes, and indeed there are articles written about this, the language in a House report does not match the language in the actual legislation. And one has to be very careful about how one reads this kind of language and how much weight one

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gives it.

And as I indicated to you before in conjunction with this injunction, this is not an issue as to which of late I have given extensive thought analysis and research.

It is not something within the purview of my two reports, and so the questions you are asking me in respect of these are ones as to which at the present moment I don't feel comfortable answering.

Q. Is it fair to say that you did not review the legislative history of Section 524 G of the Bankruptcy Code in preparing the reports that you have submitted in this case?

A. I think it is fair to say that while I am cognizant of Section 524 G, looking at the language of it, and its legislative history was not something that I did in issuing this report.

Q. Moving to a slightly different topic, do you agree that it was appropriate for the parties and the court to the Manville bankruptcy proceedings to include future claimants in that group of claimants whose claims would be resolved through the bankruptcy?

A. Do I believe that it was important for which --

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Q. Appropriate.

A. -- for which parties?

Q. For the parties and the court.

A. I believe that it was appropriate for the parties to take into account the interests of future claimants, because had they not done so, it would have made Johns-Manville the entity which then did not have the liabilities attached to it unable to function successfully and prospectively as a reorganized company.

Q. Was it a good thing for Johns-Manville to be able to operate effectively as a reorganized company?

A. I suppose it depends from whose perspective was it a good thing.

It was certainly one of Johns-Manville's goals in entering the bankruptcy system to emerge as an entity that would operate successfully. That was one of its goals.

Q. Was Johns-Manville a rehabilitatable debtor?

A. You are asking me to speculate as to whether had things gone differently than the way they did, could there have been a different result?

Q. I am actually not asking you to speculate.

I am asking you in your view was

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Johns-Manville a debtor capable of rehabilitation?
MR. MUNSON: I do object to that on the grounds that it calls for speculation. If you understand it; but you can go ahead and answer.
A. I don't think there is a way for me to answer that. I think what I can tell you is that what was done did not work.
In my expert report, I explained why I don't think it worked in this case. My belief and hope always is that Chapter 11 will allow companies to emerge, and indeed in my writings I talk about that.
But whether or not it could work here is something that I am certainly not willing to speculate about. I just know it did not work here.
Q. Professor Gross, let's turn back to Exhibit 1, your expert report, page 13.
Are you with me?
A. Yes. I am on page 13.
Q. In the full paragraph on the one, two, three, the seventh line, you see the sentence beginning, there is one other noteworthy feature. There is one other noteworthy feature in respect to the key players in the Johns-Manville plan negotiation.
While the committee of asbestos health

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claimants was represented by counsel who were active in the case, the committee itself with one exception was composed of lawyers, namely personal injury plaintiffs' lawyers.
Do you see that language?
A. Yes.
Q. Is it unusual in the mass tort bankruptcy context for the tort claimants committee to be composed of lawyers?
A. I have not done an assessment as to whether in other mass tort cases the committee of personal injury claimants has or has not been composed of primarily lawyers.
What I can tell you is that it is my considered view that there are problems with those being the people who occupy the seats around the table.
And that in my view, if one pauses to think about who should be sitting around that table, one would think long and hard before making it all lawyers.
Q. Do you know whether there are any court opinions addressing the question of whether a tort claimants committee can properly be composed of

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lawyers?
A. I don't know whether there is or is not an opinion addressing that issue.
Q. Do you know whether there has been any scholarly debate on that issue?
A. There has been a lot of scholarly debate about both who should be on committees, who should represent committees, who has conflicts, the nature and composition of committees.
And it wouldn't surprise me, although I am not familiar with precise literature addressing that exact question, but there is other literature addressing how best a committee can be structured to represent the interests that it speaks for.
And, indeed, one of the chapters in my book addresses some of the deficiencies in committee composition. And some of my very real and serious concerns about whether certain kinds of committee membership make it very difficult for that committee to speak for all parties.
And so, my answer to your question is I am not aware of specific literature on that specific point.
But I am aware of more general literature

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discussing the kinds of issues that I am raising with you about my very heartfelt concerns about committee, who sits on committees and why and what they can do in that capacity.
Q. Do you know what percentage of Johns-Manville stock or reorganized Johns-Manville stock the trust ultimately held?
A. Without, relying on my memory I believe it was 80 percent; but ultimately it was 80 percent.
Q. Let's look at page 15 of your report.
The first full paragraph begins, during the process of negotiating the plan of reorganization including in respect of the development and funding of the trust, the concept of suing the tobacco companies was explicitly raised and rejected.
Did I read that correctly?
A. Yes, you did read it correctly.
Q. Who raised the notion of suing the tobacco companies in the Johns-Manville reorganization?
A. Along the way there have been various references to suing the tobacco companies.
There are a series of pleadings filed by an entity known as ASH, in which the concept of suing the tobacco companies was raised both in the pleadings and

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in hearings.
Then it was also explicitly raised in documents that I saw that the trust itself had developed, and so I have seen various references to various parties involved in the case explicitely thinking about whether or not the tobacco companies should be sued at various junctures.
Q. ASH, is that Action on Smoking and Health?
A. I believe that is what the acronym stands for.
Q. What was Judge Lifland's reaction to ASH's suggestion that Manville should sue the tobacco companies in connection with its reorganization case?
A. I can't speak for Judge Lifland's overall views.
I can speak to those views which I was able to read in transcripts which are referenced in this material.
I would say that he was not persuaded by the pleadings that had been brought by ASH.
Q. He used some fairly strong language, didn't he, in suggesting that ASH's suggestion that the tobacco company should be sued in the Manville bankruptcy was wrong?

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A. I would say that it is hard in reading a transcript to read in tone and approach.
I do know that the concerns were sufficient that the disclosure statements specifically mentioned reference to those pleadings.
But my reading of the transcripts is that Judge Lifland was not persuaded to take those views as seriously as ASH thought they should have been taken.
Q. With respect to the decision not to sue the tobacco companies, your report goes on to say that you perceived several plausible reasons for this choice; is that right?
A. Well, the part that is attributable to me is that of what you said is that I perceive that there are several plausible reasons for this choice, and then I enumerate some of what I think those reasons are.
Q. Right.
And the choice was the choice not to sue the tobacco companies as part of the Manville bankruptcy proceedings; is that right?
A. Yes. That sentence is referring to this choice being the choice not to sue.
Q. Okay. From the use of the word plausible, is it fair to understand that you believe that there were

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other plausible explanations why the tobacco companies were not sued as part of the Manville reorganization?
A. This list wasn't intended to be exhaustive, it was meant to exemplify what I took to be the reasons that I could substantiate, based on the materials that I read, and my analysis and interpretation of what I read and my experience in Chapter 11.
There could be other plausible reasons, but these are the ones that I felt comfortable articulating here.
Q. Is the availability, or lack of availability of evidence to prove your claims a reason that you would take into consideration in deciding whether or not to initiate litigation?
A. Are you asking about as an abstract principle of --
Q. Yes.
Earlier today you listed some considerations that you would look at in advising a client whether or not to initiate litigation.
I am now asking you whether the availability of evidence is a consideration that you would take into account?
A. I think that one of the things that one would

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take into account is what I would call the likelihood of success on the merits.
Q. Is the availability of evidence relevant to the likelihood of success on the merits?
A. There are a number of things that go into making an assessment as to likelihood of success on the merits; one of which could be the availability of information.
It could also be the cost and the time delay and the effect that that litigation would have on what you were trying to achieve.
And there can be very good and plausible reasons for why one could choose not to sue, because one believed that to do so would undermine other very important things that one was trying to achieve.
Q. Would you go with me now to page 16 of your report.
You see item three is a -- involving the tobacco companies as litigants was neither necessary nor helpful as the trust could discount the amount it needed to pay personal injury claimants by subtracting therefrom any tobacco company's share, thereby reducing the amount of cash outlay that the trust needed.

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Do you see that?
A. Yes.
Q. What's the basis for your statement that the trust could discount the amount that it needed to pay personal injury claimants by subtracting therefore any tobacco company's share?
A. It is subtracting therefrom the tobacco company's share.
In reviewing the material that is appended here, I had occasion to look at the claims forms that were presented to claimants. And one of the things that was there was a line item pursuant to which the trust could subtract from the amount of a claim any amount that it believed was necessary, to ensure that it was only paying its fair share.
You see, the important feature is that the trust is obligated to only pay its share, that the trust can't pay obligations that aren't its. It was supposed to pay people who were hurt for the liability that Johns-Manville had.
And so, what I am saying here is that this was their way of making sure that they only paid their fair share, although todate, by the way, they have not paid their full fair share.

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They have only paid, at least for certain groups of claimants, a small portion of their fair share.
Q. Professor, have you performed any analysis of whether the trust was successful over time in obtaining the discount that you described here?
A. Have I --
I have not personally done a quantification of the share that the trust took.
Q. You have not performed any quantifications of the so-called discount; is that right?
MR. MUNSON: Objection. Asked and answered. But go ahead.
A. I was not asked to quantify the amount of the discount.
My expertise went to how to think about what happened to that trust from its formation to its present state, but not to quantify the dollar amount that was created by any discount.
Q. Professor, it is your opinion, is it not, that the trust was doomed to fail financially?
A. It is my view that even prior to consummation, as I indicated in my report, the trust was doomed to fail financially.

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Q. If the trust had had sufficient assets to pay all of the claims against it in full, then would it still have been doomed in your view to fail financially?
A. Earlier today you asked me whether I thought that the amount of assets given to the trust was the reason for its current position. And what I indicated to you then is what I would say to you now, the trust problems were not just because of the level of assets which it received from the debtor Johns-Manville.
The trust's problems stemmed from the actual structure of the trust. The way that trust was managed and influenced and the way that that trust operated and paid claims over time, and as I indicated before, assets alone are not the issue.
There are other very important and key pieces that explain how the trust gets to the posture that it is in now, which is that it can only pay claimants 10 percent of their allowed claim.
Q. And I guess I am asking you a different question now which is, is there a level of funding at which the trust would not have been doomed to fail financially?
A. In a counter-factual world with a different

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trust, with a different structure and different participants and different number of claims and different management and different players --
MR. MUNSON: I should object to your speculating.
A. I guess what I am saying to you is, in some completely hypothetical counter-factual world, could there ever have been enough assets; I -- I don't know.
There would be such a different world than the one that I know and looked at here, I wouldn't hazard a guess as to what that number would have had to have been.
Q. Okay.
Professor, I am asking you an a different question, it is a hypothetical one.
I am asking you to keep everything the same except for the amount of funding that the trust got.
And my question to you is, keeping the structure and the people involved and all the other issues that you just described, the same, is there a level of funding at which in your view the trust would not have been doomed to fail financially?
MR. MUNSON: I will object on the same basis. But, let me ask you this question to try

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to help you.
Does your question require, assuming that Manville itself, the company, had enough money to fund the trust to this amount that you are talking about--
MR. FINK: I am not asking where it came from.
All I am asking is there an amount of money that the trust might have received, keeping everything else about how the trust is operated the same, such that everything wouldn't have been doomed to fail financially.
MR. MUNSON: Let me make sure I understand the question. Everything about Manville stays the same.
MR. FINK: Everything about the trust stays the same.
MR. MUNSON: Manville is not involved in this equation at all?
MR. FINK: We start from the time that the trust gets funding and we go forward.
MR. MUNSON: You are not hypothesizing that the money comes from Manville you are hypothesizing that it comes --

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MR. FINK: It doesn't matter whether it is Manville or somewhere else.
My question is simply whether there is a level of funding at which the trust would not have been doomed to fail financially.
MR. MUNSON: The funding is not in your hypothetical coming from Manville, the company.
MR. FINK: My hypothetical makes no assumption one way or the other about that.
MR. MUNSON: It doesn't assume that it does come from Manville?
MR. FINK: It doesn't assume one way or the other.
MR. MUNSON: If you can answer.
A. That question for me is so counter-factual. You can't answer that question because a chapter, I can't answer the question, because the amount of funding that gets given is something that the parties have to deal with and negotiate.
And there are other groups, other than the ones we have mentioned, that took a piece of all of the funding that Johns-Manville had to resolve its economic issues, apart from the trust.
And so, in a bankruptcy situation for me,

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at least, I can't sever out the reality that how much there was to give to any particular group is integrally related to how much other groups were getting, and how much everybody negotiated and how much the debtor had to give.
And so, I can't answer that question.
Q. On page 18 of your report, Professor --
MR. MUNSON: Excuse me. Can we take a short break while you are about to change sections.
MR. FINK: Yes.
THE VIDEOGRAPHER: We are off the record at 4:02 p.m.
(Recess.)
THE VIDEOGRAPHER: Back on the record.
We are back on the video record at 4:46 p.m.
BY MR. FINK:
Q. Professor, Johns-Manville, or the reorganized Johns-Manville, emerged from bankruptcy as a successful, ongoing business; is that right?
A. Well, I would say I would not have defined it as successful on the day it emerged. It took itself awhile to get up and running. But, yes, it became a successful entity.
Q. In your view is there anything wrong about

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the fact that Manville reorganized successfully?
A. Johns-Manville, the debtor, had to do two things principally, it had to deal with its creditors fairly and equitably and it had to emerge as an ongoing business. And it did one of the two, namely emerging as a successful business.
It did not achieve the other. And what is bothersome to me or troubling to me is not that it fulfilled one of its purposes, what's troubling is that it did not fulfill the other. And it is not good to have only one of two goals met, and in that sense I am troubled by it being successful and the claimants not being nearly as successful in getting the moneys that they were owed by the debtor.
And that troubles me. And it troubles me, if I can add to that, that Johns-Manville's success is ongoing and the claimants are only getting a portion of what they are owed ongoing, and that is not good.
Q. Is it your view that Johns-Manville intended that its tort claimants not receive fair and equitable treatment?
MR. MUNSON: Objection. Calls for speculation.
Q. Have you formed a view as to whether or not

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Johns-Manville intended that its claimants not be treated fairly and equitably?

A. I would not speculate as to what Johns-Manville did or did not intend.

One hopes that the debtors appreciate the dual purposes of Chapter 11, but I can't speak to whether they did or what was in the mind of the people who ran the company.

Q. Professor Gross, on page 20 of your report, the first full paragraph begins with the statement that the trust's financial condition and the consequences of that condition had been communicated to other key participants in the Johns-Manville Chapter 11 case, including various court appointed professionals.

My question to you is, who specifically in your view was the trust's financial condition communicated to pre-consummation?

A. If it is all right, I am just going to flip back a page to just put that paragraph in context a little bit.

Q. You certainly may.

A. Based on my reading of the documents in this case, including depositions, it is my understanding that the serious financial plight of this trust was

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communicated to the future claims representative, to Judge Lifland, and was also known by and communicated to the committee of plaintiffs lawyers.

Q. Professor, if you would look at the last sentence of the same paragraph. It says that the nondisclosure of the trust's financial situation pre-consummation by the trust was not inconsistent with the interests of certain of the other key players in the Johns-Manville Chapter 11 case, as these key players wanted to see the Johns-Manville case including resolution of the pre-C claims, concluded expeditiously.

My question is whether you formed an opinion as to whether or not those parties that were aware of the trust's financial situation were engaging in some form of intentional misconduct by not disclosing that information to others?

A. I thought long and hard about whether experienced professionals behaved in ways that you described, and I think what I can tell you is that the bankruptcy system itself requires what I call transparency; it requires that information be disclosed.

It requires that whatever decisions are

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made, people make them in an informed and public, not private, way.

And that's essential to the integrity of the bankruptcy system and that aspect of this fact situation did not happen.

There was not, in my judgment, the public airing that needed to be made.

Whether that rises to the level which you just characterized as misconduct, that's a level that I am going to leave for ethics professionals to assess.

I can tell you that as a bankruptcy expert who has thought long and hard about what makes this system work, and what you need to make it work right is you need for people to be honest and open about the very hard choices that have to be made.

You have got to make them in a way that lets the public know what they are; and that did not happen here. And that's what troubles me.

Q. Am I correct in understanding your testimony that you had not formed an opinion at least that the failure to disclose the trust's financial situation as you described it constituted intentional misconduct?

A. I have not -- intentional misconduct for a professional carries a huge host of ramifications,

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and I have not been asked and I have not reached a conclusion in my own mind as to whether or not I think what they did rises to that level.

Q. Professor, is it your contention that the tobacco industry was injured by the purported failure to disclose information about the trust's financial situation in the Manville bankruptcy proceedings?

A. I have not expressed a view one way or the other as to whether or not the tobacco companies were or were not hurt by the nondisclosure of the imminent collapse of the trust.

My focus instead was on my firm belief that that insight should have been shared publicly.

Q. Professor, on page 21, the first full paragraph, if you look down to the second sentence it says: Indeed, perhaps one or more of these parties may have worried that if they had done so, they might have been sued.

This is a continuing discussion, is it not, about the lack of disclosure of information about the trust's financial situation?

A. The sentence that you read actually relates to the sentence before it, and in that sentence before it, what I am talking about is that it would have,

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which is the language I use in my report, immensely unpopular for the trust either through its staff or its trustees to have come forward and said that even though the plan was confirmed, this plan should not be consummated and this Chapter 11 will not succeed.

It would have been extremely unpopular and very difficult for the parties to have said that.

Q. Okay.

A. And I --

Q. Sorry.

A. I appreciate that difficulty. But that doesn't mean that they shouldn't have done it.

All I am doing is recognizing that it would have been very difficult for them, but sometimes you have to make very difficult choices.

That's why you are a trustee. That's why you have certain obligations in a bankruptcy to act as an officer of a court and in a fiduciary capacity.

That's your job, even if it is immensely unpopular.

Q. My question, Professor, going to the next sentence, the one that I read before, indeed perhaps one or more of these parties may have worried that if they had done so, they might have been sued.

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My question to you is, are you saying that you have seen support for the proposition that they did worry about being sued or are you speculating here?

A. In the course of reading the various documents that I read at various junctures the trustees explicitly talked about their potential to be sued. And at various points along this continuum that I have been talking about, that was an issue that troubled the trustees.

And so, in light of what I know to have worried them, it would not surprise me in the least that they would have worried that had they brought these issues to the floor, they could have been sued and that would have worried them.

Q. But you are drawing the inference; is that right?

A. Umm --

(Pause)

Q. Actually, I will strike that question.

The next sentence says they might have been worried that the disclosure would have upset the reorganization or adversely affected the value of the Johns-Manville stock.

If I ask you about your basis for this

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statement, would it be the same as your answer with respect to the prior statement?

A. Well, it's --

One of the things that I can do when I read all these documents and look at what the trustees wrote in their minutes, and what concerned them when they made presentations, and what they thought about to the extent I can see it in writing, I can try to the best of my professional ability to think through what was worrying them.

I am not them, and I know that, but I can make a thoughtful, I think, and informed assessment as to what I think people in their situation in light of what they wrote about and talked about and they thought about might have been worried about.

And --

Q. Oh, I am sorry.

A. And one of the things that they would have worried about is that this Chapter 11 would not have succeeded, and that Johns-Manville as a separate entity would not have emerged as a successful, ongoing operative business, on a go forward basis.

Q. Your next sentence says they might have worried that disclosure would create considerable delay

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in effectuating the plan of reorganization.

If I ask you the basis for that sentence, would it be the same answer as the one you just gave with respect to the prior sentence?

A. As to that sentence, and indeed perhaps parts of the others, I have read deposition testimony where parties were testifying as to why certain things happened and why certain things did not happen.

And I recollect parties talking about, concern about the delay and the consequences that might flow from delaying consummation. Indeed I recollect David Austern's deposition specifically speaking to that issue.

Q. Do you recall Mr. Austern's testimony speaking to the issue of whether there was concern that disclosure of the trust's financial condition would create considerable delay in effectuating the plan of reorganization?

A. Without his deposition in front of me, I don't want to speculate as to exactly what he said.

He believed that delaying consummation was one of the options that should have been very seriously considered and that people were unwilling to adopt his suggestion.

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Q. In light of the fact that we have about two minutes left on the video, I also suggest that we take enough of a break to switch the video and then continue.

THE VIDEOGRAPHER: We are off the video record at 5:07 p.m.

(Recess.)

THE VIDEOGRAPHER: We are back on the video record at 5:08 p.m.

Q. Professor Gross, before that brief break we were focusing on the first full paragraph on page 21 of your report.

I would now like to look at the last sentence in that paragraph which says, however, it is my opinion that the bankruptcy system required that there be public disclosure of the information that was known about the trust.

My question to you is whether you can identify any specific Bankruptcy Code provision that required such disclosure?

A. I don't want you to think that I am unfamiliar with Bankruptcy Code section specificity, but the requirement that there be public disclosure of information in a bankruptcy case underlies the entire

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bankruptcy process; as a system based on equity it requires that people deal fairly and openly, and if there is no such disclosure, the system can't work.

And the requirement for disclosure shows up in a myriad of ways throughout the bankruptcy system.

It shows up in notice requirements, it shows up in the need for the disclosure statement.

It shows up in the need for public hearings and no ex parte contacts with judges.

It appears in the requirement that parties obtain copies of pleadings, that people file reports that are docketed, that the information that happens in a bankruptcy case appear in a public record that is available.

And I guess if I were to point to a single provision of the Bankruptcy Law, I would tell you that bankruptcy is a matter of public record; it is public.

And to me that means that not only are the records public in the sense that people can access them, but the information has to be public so that they have something to access.

If you don't have that, if you don't have a public system where people know what's going on, you can't have a system with integrity. This is not a

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private transaction.

Bankruptcy is a very public forum for resolving financial difficulties. And what that means is that material like that which I have been discussing here, the trust was fatally flawed before consummation should have been part of that public record.

Q. Professor Gross, am I correct in understanding that there are various Bankruptcy Code provisions that require the disclosure of certain types of information?

A. There are bankruptcy rules as well as code provisions that reference certain types of disclosure, absolutely. But, it is not an all exclusive list of when disclosure is needed.

There are specific ones like the ones I just gave you, the disclosure statement has to be public.

I gave you another one about you need to give someone notice of complaints that are filed.

Another concrete example that I gave you was documents in a bankruptcy case are public.

But in addition to those specific ones, the entire system operates and indeed requires transparency.

That is why, for example, parties are not

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allowed to meet with the judge alone, because if they did, nobody else would know what happened there. If that happens, then you have things that occur in secret.

You can't have a trustworthy system that the public can trust and that has integrity if that happens.

Q. Professor, given your explanation of your views of how the bankruptcy process works as a whole, am I correct in understanding your testimony that you cannot identify any specific Bankruptcy Code provision or rule that mandated the disclosure of, by the trust of its financial condition?

A. Actually that is not accurate, really. I have explained several ways. Let me give you one other example.

This trust was required to file documents with the Bankruptcy Court. Those documents were supposed to be a reflection of how the trust was doing in its start-up operations.

And those documents that you file are a matter of public record, and not only did they have to file them, which was required in the bankruptcy case, but they had to be docketed and made a part of the

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public record.
The information that has concerned me here so terribly about the financial condition of the trust was not reflected in those documents.
That is very troubling because that information was communicated to a variety of people, and yet the document that was filed in the case did not refer to it.
And when you have trustees who have fiduciary duties to not only operate in accordance with the rules of the bankruptcy system, but the rules of all trusts, you can't not disclose documents and then file documents that don't contain significant information.
And everything that I have just described to you are things that are either in the Bankruptcy Code or the bankruptcy rules or were requirements of this trust by this court in this case.
Q. Professor, look with me at page 23 of your report.
Would you look under item F, it says under the most recent claims resolution system, the TDP, the smoking history of a personal injury claimant affects payout.
Can you tell me how that works?

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A. If it is all right, I just want to read the context in which the list appears.
Q. Please do.
A. So paragraph F, which is the one to which you are referring --
Q. Yes.
A. -- is included here as one of several examples which I cite as an example of the trust being aware of the studies discussing the synergistic relationship between the asbestos and tobacco products.
And this particular subparagraph is addressing two concepts, the first is that there was an explicit reduction in the amount, based on my review of the documents, a specific reduction in the amount that certain claimants got paid for certain categories of illness if that claimant were a smoker.
It is also true that the amount that claimants received was based on a historical assessment of how much claimants had received over time, and that assessment too took into account the smoking history of that particular claimant.
So, the smoking history of a claimant affected the amount of money that that claimant

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received.
And the reason that it matters is that the trust was duty bound to pay for asbestos claimants, and it was duty bound to pay them under both bankruptcy law and under the trust agreement. It was not supposed to pay anything other than that.
And so, the smoking history was at least one of the ways in which the trust, I assume, was trying to make sure that it paid only its share of liability.
Q. Professor, I think you are answering a different question from the one I was asking.
My question is just how, your statement here that under the TDP the smoking history of a personal injury of claimant affects payout, and all I am asking you is how that works under the TDP.
A. I think that is --
Let me try it again, maybe I did not --
Q. I am asking if you can describe the TDP provision that, if any, that effectuates what you described here in your understanding of how that works.
A. Well, the TDP did a number of things, but one of the things that it did is it created in its last iteration, in its last creation it created a claims

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matrix.
And one of the things that was in that matrix was a specific provision that certain types of claims would be paid different amounts depending on whether or not the claimant smoked.
And if the claimant smoked, the amount that the trust had to pay was less, and so, that is one example of how smoking was referred to in the resolution of claims.
Also, in creating that matrix, that system of what each category of claim was worth, it is my understanding that the way those amounts were derived was based on historical data of how much claimants had been paid in the past.
And claimants in the past were paid taking into account whether they did or did not smoke.
Indeed, as I think I referenced earlier today, that the early claim forms themselves had a specific space on them where a claimant had to indicate his or her smoking history, and then there was a little space pursuant to which there was a subtraction box for taking away an amount from the total amount of the claim based on whether or not that claimant smoked.
Q. That is --

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A. So --
Q. That claim form that you just described with the little check box and reduction, were those claim forms that were used while the TDP was in place?
A. The specific one to which I was just referring is not actually a TDP one.
There were a variety of claim forms that were used over the course of the case, and over the course of the trust's handling of claims.
Indeed, the trust changed those claim forms over the passage of time. But the reason the early one, the pre-TDP one is relevant and important is that the way the matrix was created, relied on or took into account the way claims were determined before that matrix was created.
And so it is yet another example of why history matters here and why one can't look at any of this as an isolated moment in time.
All that happens here is couched in a long and very involved history that has to be told before you can understand the single event.
In other words, nothing is in a vacuum here; things are in a context.
In this case that early claim form is part of

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that context.
Q. Professor, have you attempted to quantify the extent to which the trust has reduced, if at all, the payments that it has made to trust claimants as a result of this TDP provision that you make reference to with respect to smoking history?
A. I am sorry. Can you just --
Q. The question is whether you have made any effort to quantify the reduction, if any, in payments that the trust has made as a result of this TDP provision that you are describing relating to smoking history?
A. I have not quantified, I have not quantified, I have not done a quantification of the actual payment history of the trust in terms of putting what it did into concrete numbers.
I was not asked to do that, and people with expertise in quantification would be much more able than I to make that assessment.
Q. Professor, are you familiar with the Cipollone case?
A. Um, I would say in a general sense I am familiar with it. I, umm --
Q. You make reference to it in your report?

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A. Yes. I do make reference to it in the report and I am familiar with it as a generalized matter.
Q. Do you know what the ultimate outcome of that case was?
A. I know that case was ultimately appealed, and indeed if memory serves there are several appellate decisions growing out of that case.
Q. Do you know how much money, if at all, the Cipollone plaintiff ultimately recovered?
A. No, I don't.
I don't know if he did ultimately, at the end of the day when the appeals were all done, I don't know whether he did or did not recover.
Q. On page 26 of your report, Professor, under heading C, the last sentence you say, commencing a lawsuit against the tobacco companies would have involved reentry into the tort system, something the key players in the Chapter 11 case and the trust were trying to avoid.
My question to you is, in what sense would commencing a lawsuit against the tobacco industry have involved a reentry of the trust into the tort system?
A. If I could, I just want to place this paragraph in context.

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Q. You are certainly free to review anything that you need to to place it in context.
A. Any lawsuit that would have been commenced against the tobacco companies would have necessarily raised the issues about how much the trust was obligated, how much Johns-Manville had been obligated to pay people who were injured. Because certainly Johns-Manville owed people money for injuries they suffered from asbestos.
And to make that assessment of how much Johns-Manville owed people who were injured from asbestos, were it to have been litigated would have occurred in the context of the tort system.
And Johns-Manville, and then the trust knew that if you entered the tort system and decided each case on a one by one basis, that was a very long, arduous and expensive case by case determination.
And if they had commenced a lawsuit against the tobacco companies, they would have been put back in the same position that they were trying to avoid through the use of the claims matrix system and through the use of the entire bankruptcy process, which was to resolve these claims outside the tort system, not in it.

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And if a lawsuit had been commenced against tobacco, they would have been forced to address the issues in the tort system that they had found other ways of resolving through the bankruptcy and the trust.

Q. How would they have been forced to address those issues in the tort system?

A. Well, when the trust and debtor, Johns-Manville tried to resolve how much they owed people in the tort system, it led to an abundance of litigation and it was very expensive and very time-consuming.

And one of the goals of filing the Chapter 11 was to get out of the tort system and to find another way of resolving these issues.

If the tobacco companies had been sued, the tobacco companies necessarily and understandably would have wanted these issues resolved on a case-by-case basis and they would be entitled to know that for which they had liability. They are entitled to know what, if anything, they might have owed.

And they weren't in bankruptcy, they weren't bound by the claims matrix. And so, you can't take away the ability of the tobacco companies to defend

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themselves; they are entitled to that.

And the way their defense and the law is housed, it is housed in the tort system. And that's a place that they have a right to be, and it is a place where the trust did not want to be; and I think it is fair to say that the trust knew that.

Q. Professor, is it your position that the trust did not deserve to obtain a recovery in this case?

MR. MUNSON: I object on lack of foundation.

MS. DONAHUE: I couldn't hear the question.

Q. The question was, Professor, is it your position that the trust doesn't deserve to obtain a recovery from the tobacco industry in this case?

A. Deserve is a very loaded word. I don't think that the trust, I have been asked to assess how the trust got in the position that it got into; and whether or not its current posture can be explained based on a very long and complicated history about how it got to where it is.

And I can tell you that based on my examination of that history, namely the trust being substantially flawed and economically inadequate, to all of the steps that happened along the way in terms of lack of public disclosure, how the trust functioned,

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structured, operated and handled claims and decisions prospectively, and the choices that it made and did not make along the way, all go to explain why it is that I believe that the trust is responsible for what happened to it and not the tobacco companies. And that the --

Q. Excuse me.

A. If I could just finish.

Q. Please do.

A. -- the position that the trust finds itself in is not the responsibility of the tobacco companies.

Q. Have you formed a view as to whether or not the tobacco companies have caused the trust to suffer any injury at all?

A. I have not assessed whether the tobacco companies did or did not do anything, but whether they did or did not is not relevant to what I have been asked to think about, which is how did the trust end up in the situation that it ended up in?

And it got there, the trust got to where it got through things that had nothing to do at all with the tobacco companies.

It got there for, the reasons that start with its creation and continue through its structure, its operation, its management and the choices that it did

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and did not make over the course of time. And those aren't ones that involved tobacco, that's --

Q. Professor, regardless of the history of the trust, and let's assume that --

A. I am sorry.

Q. Regardless of the history of the trust, and let's assume for the moment that you are right, that the trust had various problems as a result of its own conduct, does that exclude the possibility that the tobacco industry also caused injury to the trust?

MR. MUNSON: Objection. Asked and answered.

A. I am not willing to do away with history. History is far too important, context is far too important to do away with, so I can't take the trust out of its history.

Q. I am not asking you to do that, Professor.

I am asking you to assume that the history is as you described it and that the trust has the problems that you described as a result of its own conduct.

And I am then asking you isn't it possible nonetheless that the tobacco industry has caused injury to the trust?

A. What I indicated, I think it was a question ago before that which was my answer to that, which is

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that I did not look at, and I am not going to speculate about whether the tobacco companies did or did not do anything that could have injured the trust.

What I will tell you is that everything that I have seen which takes the lengthy history of the trust into account, explains how the trust got to where it is, and it got to where it is without the tobacco companies doing or not doing anything.

Q. Did the number of claims that were ultimately filed against the trust contribute to its problems?

A. The number of claims that the trust had to address is a very important issue, but it is not just a matter of numbers.

The number of claims that the trust, with which the trust had to deal most assuredly grew over time.

What's also relevant is what precipitated their growth and the timing of that growth.

So, it is both the number of claims and the timing of those claims, and then the way the trust addressed those claims, all of those issues which go to in a very big sense the number of claims, certainly affected among many factors how the trust operated.

Q. Okay. I am not sure you answered my question

and, again, I think it is amenable to a yes or no answer.

My question is simply whether the number of claims that have been filed against the trust have in your view contributed to the trust's problems?

A. It matters to me how the number got to be what it is, but there is no question, but that the number of claims grew and that the estimates contained in the disclosure statement turned out to be significantly different and underestimated the magnitude of the claims with which the trust had to deal.

For me then the question is both in absolute number compared to the disclosure statement, the claims grew, but I also care about how they came to grow so big and when they grew that big.

Q. Professor, I appreciate all that.

Again, I don't think you have answered my question, and again, I believe it is amenable to a yes or no.

In your view, has the number of claims filed against the trust contributed to the trust's problems?

A. I know you want a yes or no answer and I wish it were that easy.

It is not just the number of claims that contributed to the process, it is when you have a big number, how do you handle them and what do you do with them and how do you pay them.

The number was greater than expected, that's true, but it is not just the number that gave rise to the problems, it is what they did with the number.

MR. FINK: Counsel, it is quarter to 6 and I think this would be a good breaking point.

MR. MUNSON: Fine with us.

THE VIDEOGRAPHER: We are off the video record at 5:46 p.m.

(Time noted: 5:46 p.m.)

KAREN GROSS, ESQ.

Subscribed and sworn to before me
this day of 2000.

CERTIFICATE

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

I, ROBERT X. SHAW, CSR, a Notary Public within and for the State of New York, do hereby certify:

That KAREN GROSS, ESQ., the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 7th day of June, 2000.

ROBERT X. SHAW, CSR

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